INSTITUTIONS OF THE Criminal Law OF SCOTLAND.

For the Use of the Students who attend the Lectures of

ALEXANDER BAYNE, J. P.

EDINBURGH:

Printed by Mr. *Thomas* and *Walter Ruddimans*, and sold by Mr. *William Monro* at his Shop in the *Parliament-Close*. MDCCXXX.

INSTITUTIONS

OF THE

To the Reader.

THE following Sheets contain the chief Heads of Discourse, which are treated of at large in my Lectures *upon the* Criminal Law. *Hitherto they were dictated to the Students to serve in place of a Text-book, and therefore delivered with all Brevity and proper References: But perceiving that the taking them down in Writing was a Trouble from which my Hearers wished to be relieved, I have been induced to print them for their greater Ease. If others find them useful as a Summary of Matters which they have already studied, of which however it is fit sometimes to renew the Remembrance, I shall have a Pleasure by this Publication, which at first I had not in View.*

INSTITUTIONS OF THE *Criminal Law* OF SCOTLAND.

Preliminary Observations.

THAT Part of our Law which treats of *Crimes*, has been less cultivated than that which treats of *Private Right*. The first remains almost in the same State wherein it has always been;

the laſt has received many late Improvements, and is at length formed into a Syſtem peculiar to us, which is owing to the Difference there is in the Objects of theſe different Laws, and the natural Conſequences of that Difference.

2. The Object of the laſt is the Matter of *Private Right*, wherein there is no leſs Diverſity and Extent of Subject than Number and Variety of Rules to govern it; and theſe, originally derived from the Civil and Feudal Laws, we have in Courſe of Time accommodated to the particular Genius and Manners of our Country.

3. The Object of the *Firſt* is the *Peace* and *Order* of the Community, chiefly to be accompliſhed by the condign Puniſhment of Crimes, for which neither ſo great a Number of Rules were requiſite, nor was it ſo needful to accommodate them to our particular Conſtitution, ſince the Nature of Man remaining the ſame in all Times and Places, Crimes affect all States and Kingdoms almoſt in the ſame manner.

4. Hence

4. Hence the Necessity of accommodating to our own Constitution the Rules of the private Law, which we had borrowed from the private Law of the *Romans*, and the Cause of forming it at length into a System proper to us: And hence the Reason that their Criminal Law needed small Alteration to make it ours, and being thus fit for our Use, as it stood in the Body of the *Roman* Laws, superseded the Necessity of our reducing it into a peculiar System of our own.

5. Two Things are to be considered as to the Order and Method of treating of *Crimes*, *viz.* The classing them properly in Titles, according to the Place and Rank they hold; and the Method of treating each particular Crime in its proper Class. *Method* in this, is of indispensable Use; *Order* in that, a matter of Propriety, which, tho' arbitrary, is nevertheless to be duly regarded.

6. The most capital *common Character* of all Crimes consists in the Disturbance they create to the Peace and

Order

Order of the *Society*. Thence the more the higher Parts of that Order are disturbed, the higher Crime. Of which Order, we reckon four chief Parts which are the Foundations of it. The *First* consists in the Dependence which the Society, and every thing thereto relating, has upon the *supreme Being*. The *Second*, in that Authority which is derived to the *temporal Powers*, for the Government of the Society. The *Third*, in the Preservation of the Ties of *Marriage* and of *Birth*, which are the chief Bonds of the *Society*. And the *Fourth*, in maintaining the Use of those *Engagements* which contribute to unite Men together by a Communication of their Labour and Industry. Hence four different *Classes* of Crimes. The Character of those of the *First*, is, to attempt somewhat whereby the *Divine Majesty* is offended. Of the *Second*, to invade the essential Privileges and Prerogative of the *supreme Powers* of the State. Of the *Third*, to violate the Ties of *Marriage* and *Birth*, and disturb their Use. Of the *Fourth*, to

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hurt Men in their *Persons* and *Effects*, or to wound them in their *Honour* and *Reputation*. The Place each Crime ought to hold in its proper Class, will be according as it participates more or less of the *common Character*. See *Domat's Treatise of Crimes*, 2 *Vol.* 3 *Book*.

7. Of the first Class is the Crime of *Blasphemy*; of the second, *High Treason*, *Sedition*, *Deforcement*, and *breaking of Prison*; of the third, *Bigamy*, *Adultery*, *Rape* and *Incest*; of the fourth, *wilful Fire-raising*, *Murder*, *Parricide*, *Duels*, *Poison*, *Theft*, *Reset of Theft*, *Robbery*, *Falsehood*, *Stellionate*, *Perjury*, *Usury* and *Injuries*.

8. The Word *Crime*, in ordinary Acceptation, signifies an Offence which falls under the Correction of the Publick. *Delict*, *Delinquence* or *Trespass*, expresses an Offence of an inferior Character, to be chastised only by the Effect of a civil Action, for Reparation of private Damage.

9. *Dolus*, or a malevolent Intention, is an essential Ingredient to constitute an Action criminal; but no Negligence

is equal to it in matter of Crimes, wherein the Will, not the Event, must be regarded, *l.* 7. & *l.* 14. *ff. ad leg. Cornel. de sicariis*: Unless the Negligence is so extremely supine, as can hardly be conceived without implying *Dole*, *l.* 11. *de incendio, ruina, naufragio*, &c.

10. Under *Dole* are comprehended the Vices and Errors of the *Will*, which are immediately productive of the criminal Fact, though not premeditated, but the Effect of sudden Passion.

11. But the bare Intention never brought forth into Act, is no Crime; yet giving Counsel to perpetrate, and the Fact following, is. See *Matth.* c. 11. § 9. of his *Proleg.* Either *aiding* or *advising* is giving Counsel, and expresses what we mean by *Art* and *Part*, or the being an Accomplice of the Crime.

12. The Facts inferring *Art* and *Part* need not be particularly laid in the *Libel* or *Indictment*, for these general Words, as Terms of stated Signification, are sufficient, *Act* 153. *Parl.* 16. *James* VI. yet one may set forth

these

these Facts, if he pleases; and he would do well so to do, if he means rather to confide in the Court than in the Jury. See *Macken. n.* 2. *h. t.* In the criminal Letters the Persons of the Accomplices must be described by proper Names and Designations, *Act.* 76. *Parl.* 6. *James* VI.

13. One may be *Art* and *Part*, 1. By giving Counsel to perpetrate, without Distinction whether the Crime would have been committed without such Counsel or no, as being a Matter we can never perfectly know. See *Macken.* 1. 33. *n.* 3. But under this Distinction; That in the more atrocious Crimes, the *Counsellor* is equally punished with the *Committer*: In the less atrocious, less severely. Reasons also arising from his [illegible] his Age, the manner of advising, and from certain Tokens of Repentance, justly plead a Mitigation of his Punishment. 2. By Aid and Assistance, *previous*, *concomitant* or *subsequent* to the Commission of the Crime. The first rarely comes up to *Art* and *Part*, unless

less

lefs very particularly qualified: The second commonly does, and is easy to be known, if it does not: The third never, and hardly deserves the Name; if it is any thing, it is abetting, as providing for the Criminal's Escape: But any of the *three* make *Art* and *Part*, if the Perpetration was premeditated. 3. By a clear and explicite Mandate to commit the Crime, or to do somewhat unlawful in itself, which with great Probability might produce it, if executed by the Hand of the Mandatary, and not that of another.

14. In lesser Crimes, the Command of the Prince or Magistrate, some say, of a Father, excuse altogether. In atrocious ones they plead a Mitigation of the ordinary Punishment, as do those of a Master; but they excuse not the Servant altogether, even in lesser Crimes. *Mack. t. 35. n. 5, 6.*

15. Ratihabition of Crimes is in no View equal to Mandate, nor will ever amount to *Art* and *Part*. See *Matth.* in his *Proleg. n. 14. c. 1.*

16. The *Accomplice* can only be prosecuted

ſecuted after the Conviction of the *principal Offender*, *Reg. Majeſt. B.* 4. *c.* 26. and *Skene's Annotat. LL. David* II. *c.* 29. *Quon. Attach. c.* 83. *l.* 10. *ff. de ſervo corrupto*; *Clarus*, *Queſt.* 90. *n.* 6. not only becauſe it is proper, but becauſe great Hardſhips would follow, were it otherwiſe, (the 76 *Act*, 6 *Parl. James* VI. notwithſtanding, being in *materia diverſa*:) Unleſs the Acceſſion of the Accomplice is immediate *in ipſo actu*, ſo as in Effect to render him Co-principal; or the Crime is committed by his Command; as in the Caſe of *Charles Robertſon*, mentioned by *Macken. t.* 35. *n.* 9. And in another, *Anno* 1695, *Auguſt* 5.

17. By the general Rule, the Accomplice ſuffers the ſame Puniſhment with the principal Offender: Yet the Part he acted claims great Attention; for if he is remarkably leſs guilty, Juſtice will not permit equal Puniſhment.

18. Since *Dole* is an eſſential ingredient of every Crime, *Brutes* are utterly incapable of giving Offence. Hence *Infants* and *furious Perſons* cannot com-

mit Crimes. Persons under *Puberty* are capable of committing the higher Crimes, which, as offending the Law of Nature, are staring and obvious; but not the smaller Crimes arising from positive Law or Statute; and with neither are they chargeable during Nonage, unless very attrocious; nor as *Art* and *Part. Matth. Proleg. c.* 2. § 1. 2. 19. While Persons are under a Distemper which divests them of the Use of their Reason, they cannot be punished for a Crime committed in their former State of Health; because in them the chief End of Punishment would be lost: And although such cannot commit Crimes, yet a short Suspension of the Judgment by the Effects of Wine, according to our Practice, is no relevant Defence; and was repelled in the Case of *Spot* and *Douglas*, for killing *Home* of *Eccles*, *Anno* 1667: And in some later Cases little regarded. *Deaf* and *dumb* Persons have no better Plea for Impunity, since their Defect does not render them incapable of a malevolent Intention. *Matth. ibid.* n. 3, 6.

20. Great-

no Greater Communities and Bodies Politick cannot properly be charged with the Commission of a Crime; lesser Incorporations may, because the whole Members may be concurring or consenting.

Blasphemy.

BLASPHEMY, in Law called *læsa Majestas divina*, is committed either by the absolute Denial of the Existence of the *Supreme Being*, or of any of his *essential Attributes*; or by ascribing to him what is inconsistent with his infinite Perfection. This Crime of all others, renders the Offender the most unworthy to live in any Society, and discovers the most abandoned Nature: For as every thing which in any sort is either the Object of our Senses, or of our Understanding, conspires to engage us to pay the most perfect Adoration to the Almighty Author; therefore an Act so outragiously contradictory to that Adoration, must flow from a *Will* infinitely perverse,

and be in itself beyond measure criminal.

2. By the *Divine Law*, *Blasphemy* was punished with the Pains of Death. *Levit.* xxiv. 13, 14, 15, 16; and also by the *Civil Law*, 77 *Novell.* In *Spain*, *Naples*, *France* and *Italy*, the Pains of Death are not now inflicted. In the *Empire*, either Amputation or Death is made the Punishment of this Crime, by a Constitution of *Charles* V. See *Carpzov.* p. 1. *Q.* 43. *n.* 4, and 24.

3. The Rule which might be formed from the general Practice of these Places where this Crime is punished capitally, is this, That absolute *Blasphemy*, such as is here described, is to be punished capitally; which is extended to comprehend those who utter Maledictions against the Author of their Being: But then the Rule, following their Practice, would be limited to an arbitrary Punishment, b. In the Case of those who were under a total Alienation of Mind by the Effects of Wine. 2. Of those who have been surprised into some violent Fit of Grief or Anger, from some Cause of Moment, and

while

while lawfully employed. 3. Of those who shew a sudden Repentance, accompanied with Horror at the detested Crime: But Rasticity is no Excuse.

4. According to our written Law, the Punishment of *Blasphemy* is Death: And the *first* Species thereof consists in the railing upon, or cursing GOD; That is, uttering Imprecations against the *Almighty* (unless the Offender is under the Power of Madness) without Distinction, whether he continues in the Practice of it or no; for the *single Act* constitutes the Crime. The *second* consists in the denying the Existence of the Supreme Being, or any of the Persons of the Blessed Trinity, and therein persevering obstinately to the last; for reiterated Denial does not fully constitute the Crime, because the Statute admits of Repentance before Conviction, as a complete Expiation. *Act* 21. *Parl.* 1. *Sess.* 1. *Charles* II.

5. This *Act* 1661 is ratified by *Act* 13. *Sess.* 5. K. *William*: And it is further thereby provided, That none shall either in Discourse or Writing,

call in Question the Existence of God, or any of the Persons of the *Trinity*, or the Authority of the *Scriptures*, or the *Divine Providence* in the Government of the Universe: And that the Punishment of the *first* Offence shall be Imprisonment, till Satisfaction given by publick Repentance in Sackcloth. Of the *second*, a Fine of a Year's valued Rent of the real Estate, and twentieth Part of the personal Estate. The Trial of both which is competent to the inferior Judges. That the Punishment of the *third* Offence shall be Death, to be tried only by the *Justices*. Upon these two Acts we had one noted Trial, in the Case of *Thomas Aikenhead*, *Anno* 1696, who was thereupon convicted and executed.

High Treason.

THIS Crime offends against the second Part of the Order of Society, and is a Complication of several Crimes. It participates of the Nature of *Parricide*, *Falsehood* and *Perjury*, and

of

of all others threatens most Mischief to the Community, by a Subversion of that Power which governs it, and by introducing Anarchy, in place of regular Subordination and comely Order.

2. In the Civil Law, it is called the *Crime of Majesty*; of which the *Romans* distinguished two Kinds, by the Names of *Perduellion* and *Lese-majesty*; between which *Mackenzie*, following *Mevius*, makes four remarkable Differences. See *Macken. n. 2. h. t.* and *Matth. c. 2. n. 2. h. t.*

3. The Crime is committed against those in whom the supreme Power is vested, whether in a King, in Nobles, or in the People. It can only be committed in any State, by those who are Subjects either by Nature or Law; that is, by Birth or Naturalization: And by many different Ways in the *Roman* Law might this Crime be committed. See *Matth. c. 2. n. 2, 3, 4, &c. h. t.* The Punishment was capital, without Distinction, according to *Matth. c. 3. n. 1. h. t.* And many Hardships made to accompany it, by the noted

nexed Constitution of *Arcadius* and *Honorius*, *l.* 5. *Cod. v. h. t.* remarkable only for its Severity, making the Children of the Traitor incapable of Succession to their Mother or Grandmother, or to take any thing bequeathed by the Testaments of Strangers; to be even poor and needy, loaded with paternal Infamy, excluded from all Honours, that Life might be to them a Punishment, and Death a Consolation. See *Matth. c.* 3. *n.* 3. *h. t.* In the Trials of this Crime many singular Things were admitted, contrary to the Course of their Law in other Crimes. Infamous Persons might be Accusers, Women also and Soldiers: Servants were heard against their Masters, and freed-Men against their Patrons, with several other Singularities, tending to make the Condition of the Offender as hard as possible.

4. Although it is the chief Character of this Crime, to attempt somewhat that strikes either immediately or by direct Consequence against the Supreme Power of the State; yet there were

were certain criminal Facts, without this treasonable Character, which were declared Treason by our Statutes. Thus, according to our Law before the Union, Treason might be properly distinguished into that which was statutory, and that which was not; the last for Distinction, we call *High Treason*.

3. Of *High Treason* we had many different Species's. 1. Rising in Arms and open Rebellion against the King. See *Act* 3. *James* I. *Act* 24. *James* II. and *Act* 5. *Sess.* 1. *Parl.* 1. *Char.* II. clearly founded in these Statutes: In some of which it is thus expressed, *Rising in Wars of Wars against his Majesty*; that is, rising with a hostile Intention against the Prince or Common-wealth; in the Civil Law called *Perduellion*. 2. Laying Hands upon the King's Person violently, of what Age soever he be; or to attempt somewhat by which the personal Safety of the King is more immediately threatned, *Act* 24. *James* II. 3. Resetting Traitors, or those who lye at the Horn for treasonable Practices, *Act* 24. *James* II.

and

and 97. *James* V. Within the Deſcription of which Act, a Wife concealing her Husband in his own Houſe would not come, nor other Relations ſupplying him with the common Neceſſaries of Life, providing they gave him no Aid tending to promote his treaſonable Practices. In the *Act* 25. *James* II. there are ſeveral other treaſonable Facts mentioned, not ſo much to be conſidered as different Kinds of Treaſon, as different Branches of the ſame Species. 4. Aſſailing or attacking the King's Caſtles, where he happens for the Time to be, without the Warrant of the Three Eſtates, *Act* 24. *James* II. 5. Raiſing a Fray in the King's Hoſt wilfully, or with a bad Intention, and without a juſt Cauſe, *Act* 54. *James* II. 6. The moving any Queſtion, Pick, Grudge or Quarrel, againſt thoſe who had ſlain ſuch as had been lawfully declared Traitors, *Act* 8. Q. *Mary*. 7. Impugning the Dignity and Authority of the Three Eſtates of Parliament, or attempting any Diminution of its Power and Authority,

thority, *Act* 130. *Parl.* 8. *James* VI. 8. Declining the Judgment and Authority of the King in any Matter Civil or Ecclesiastick. Both these became Treason by the particular Exigencies of the Times, *Act* 129. *Parl.* 8. *James* VI. 9. The concealing, and not revealing the Treason of another, *Act* 49. *Parl.* 11. *James* VI. 10. Denying the King's Power to call, prorogue and dissolve Parliaments, *Act* 3. *Parl.* 1. *Charles* II.

6. The *Statutory Treasons* were, *wilful Fire-raising, Theft committed by a landed Man, Murder under Trust*, and *Assassination*. But these are by the *Treason Act*, 7*mo Annæ*, declared to be only simple capital Crimes. See the six chief Heads of the Act, of which this is the last. Hereby all our former Laws concerning Treason are repealed, and the Treason Laws of *England* substituted in their Place.

7. What is now deemed *High Treason*, is to be gathered from the 25. *Edward* III. and the several Statutes of *England* since, concerning Treason.

In

In this noted Statute there are four Kinds of Treason; the *first* concerns the King's Person; the *second* that Part of the Kingly Office which respects the Administration of Justice; the *third* his Seal; and the *fourth* his Coin.

8. All Persons Secular and Ecclesiastick, without Distinction of Sex, are capable of committing this Crime, if they are Subjects even in respect of present Residence and local Allegiance, of the Age of Discretion, that is, fourteen Years, and of *sane* Memory.

9. Of the first Kind of Treason, to compass or imagine the Death of the King, is the chief Branch; but this Intention must be made manifest by some overt Act, which either directly and immediately, or in its plain and natural Consequences threatens Peril of his Life. By a Statute of *Henry* VII. the King for the Time being, is the King within the Meaning of this Statute, or the Heir of the last King dying in Possession before his Coronation; but not a titular King, or Husband of a Queen regnant, only she herself:

ſelf: For to compaſs or imagine the Death of the Queen of the preſent King, is within the Letter of the Statute; not that of a Queen Dowager: Or the Death of the eldeſt Son and Heir. Even the Death of any collateral Heir apparent of the Crown, is within the Reaſon of the Statute. It is Treaſon to violate during the Life of the King, his Queen or Royal Conſort; not a Queen Dowager, becauſe ſhe is not his Companion in the Terms of the Statute; and if the Queen is conſenting, it is Treaſon in her: Or the King's eldeſt Daughter unmarried, if no Iſſue exiſts of an elder deceaſed: Or the Wife of the King's eldeſt Son and Heir. See *Hawkin's Pleas of the Crown, b. t.* and *Wood's Inſtitutes, b. t.*

10. The *ſecond* general Branch of the firſt Kind of Treaſon, conſiſts in actual levying War, in order to dethrone the King, or reform his Government; but not in levying that which is intended for Redreſs of private Grievances. It conſiſts alſo in aiding, comforting and adhering to

thoſe who are acting in Hoſtility againſt the King within the Realm.

11. Theſe treaſonable Acts and Purpoſes muſt be made manifeſt by ſome overt Act, which ought to be explicitely laid in the Indictment of *High Treaſon.* It is a Queſtion in which the *Engliſh* Lawyers are not well agreed, if the uttering treaſonable Words amounts to an overt Act of compaſſing and imagining the King's Death, tho' they are ſignificant of ſuch Intention. Words, even deliberately uttered, when they tend to the Perpetration of ſome wicked Purpoſe, are leſs frequently followed with the Effect, than Actions ſignifying the like Purpoſe commonly are. *Coke* and *Hales* think they amount not to an overt Act. See *Hawkins ibid.* with the Authorities there cited, 1 *Mary, Seſſ.* 1. *c.* 1.

12. The *ſecond* Kind of Treaſon ariſing from this Statute of *Edward* III. concerns the King's Office in the Adminiſtration of Juſtice: Thus it is made *High Treaſon,* to ſlay the Chancellor, Treaſurer, or the King's Juſtices of the one

one Bench or other, Justices in Eyre, or Justices of Assize, and all other Justices assigned to hear and determine, while they are employed in their Offices. And by the *Act*, 7*mo Annæ*, *c.* 21. § 8. it is Treason to slay any of the Lords of Session, or Lords of Justiciary, sitting in Judgment in the Exercise of their Office, within *Scotland*.

13. The *third* Kind of Treason consists, in counterfeiting the *King's Great* or *Privy-Seal*, and is extended to the Aiders of such counterfeiting. And by the *Act* 1. *Mary* 6. counterfeiting the *Sign-Manual* and *Privy-Signet*, is declared *Treason*.

14. The *fourth* Kind of Treason arising from this Statute of *Edward* III. consists in counterfeiting the Coin: Coining without Authority, whether they utter it or not, or making it of baser Alloy, is counterfeiting. Receiving and comforting the Offenders is equally criminal; but clipping is not within the Statute. By the Words *Kings-Money*, are only meant the Gold and Silver Coins stampt with his Ma-

jeſty's Authority; but forging foreign Coin of Gold or Silver, current by his Majeſty's Authority, is Treaſon by the 1 *Mary, Seſſ.* 2. *c.* 6. And forging Money not current, is Miſpriſion of Treaſon, by the 14 *Eliſabeth*, 3. Waſhing, clipping round or filing, is Treaſon, by 5 *Eliſabeth*, 11. Impairing, diminiſhing, falſifying, ſcaling, is Treaſon, by 18 *Eliſabeth*, 1. And making, mending, or having in Poſſeſſion any of the Inſtruments of Coinage, or Counterfeiting, colouring or gilding any Coin, is Treaſon, by 7 *Annæ*, 25. But both theſe laſt is without Corruption of Blood, or Loſs of Dower. See alſo 6 and 7 *William* III. 17. By the ſecond Branch of the Clauſe in 25 *Edward* III. falſe Money imported by a Perſon, knowing it to be ſuch, from a foreign Nation, is Treaſon, but bare uttering by one who did not import it, is not Treaſon.

15. Several other Offences are made Treaſon, ſince the Statute of the 1. *Mary*, By which it is enacted, *That no Offence ſhall be deemed Treaſon, but what*

is

is declared such by the 25. Edward III. And these may be classed under two general Heads; 1. Offences in upholding and favouring the Power of the Pope, 5 *Elisabeth*, 1, 2, and 10. 13 *Elisabeth* 2, 2 and 3. 23 *Elisabeth* 1, 2. 3 *James* I. 4, 22, 23. 27 *Elisabeth* 2, 3. 5 *Elisabeth* 1, 11, 12, and 20. 2. Certain Offences against the Protestant Succession, are made Treason by 1 *Annæ* 17. 4 *Annæ* 8. 1, 2. 6 *Annæ*, 1. 1, 2 and 1 *Annæ*, c. 17.

16. Misprision of Treason, is the Concealment of our bare Knowledge of Treason, or the Omission to make a Discovery thereof to the Magistrate; for the telling of it to our Friend or Acquaintance is in the Construction of Law no Discovery. Thus Misprisions consist in negative Acts, or not doing, except that positive Misprision of Treason in the 14 *Elisabeth*, 3.

17. The Punishment of Treason, and Misprision of Treason, consists in these Particulars; 1. Forfeiture of Life and whole Heritage, whether in fee simple or entailed, whether held of the Crown,

or of a Subject; with this Exception, That if the Person attainted, is seised of a tailzied Estate in *Scotland*, with irritant and resolutive Clauses, and is married, and has Issue, or the Possibility of Issue at the Time of the Treason committed, the Estate shall be forfeited only for his own Life; for the Issue and Heirs of such Marriage shall inherit the same after his Death, 7 *Annæ*, c. 21. 2. Forfeiture of the Wife's Dower or Terce. 3. Loss of Children, by their being made base and ignoble. 4. Loss of Posterity, by the Corruption of Blood. And *lastly*, Loss of all Goods and Chattels.

18. The Forfeiture of the Estate arises partly from Common Law, partly from Statute. By the Common Law are forfeited to the Crown all Lands of Inheritance whereof the Offender was seised in his own Right, and in Possession: All Rights of Entry: The first vest in the King upon the Death of the Offender, without Office, that is, without Declarator; but during his Life an Office is necessary to take the

Free-

Freehold out of his Person. 2. The Inheritance of Things not lying in Tenure, Rents, Commons, &c. But no Rights of Action to Lands of an Estate of Inheritance are forfeited either by Common Law or Statute. See the *Explanation of Rights of Entry and of Action*, in *Cowel's*, *Blount's*, or *Giles Jacob's Dictionaries*. 3. The Rents and Profits of Lands whereof the attainted Person is possessed in Right of his Wife, or of an Estate for Life only. By Statute are forfeited all Lands, Tenements and Hereditaments, Uses, Rights, Entries, Conditions, Possessions, Reversions, Remainders in the Person of the Offender at the Time of the Treason committed, or afterwards; and are adjudged to be in the actual and real Possession of the Crown, without Office found. But Goods and Chattels, whether real or personal, are forfeited only from the Time of the Conviction. The Wife forfeits her legal Provision, but not a conventional one, 26 *Henry* VIII. 13. and 38 *Hen.* VIII.

19. The Effects of the Corruption of Blood

Blood consequent upon the Attainder of *High Treason*, are these: The Offender loses all Nobility or Gentility, and thence forward becomes ignoble; can neither inherit as Heir, nor have an Heir; nor can any derive a Title, in the way of Succession, thro' his Person, the Blood through which the Descent must be conveyed being corrupted. Restitution of Blood can only be effected by Act of Parliament; for the King's Pardon gives a new Capacity only for all Matters and Things subsequent to it, *Coke* 1 *Inst.* 8. *a.* 391. *b.* 392. *a.* 3 *Inst.* 233, 340, 241. As to the Statutes of Treason, and the Form of Trial, see the *Collection* made by Order of the House of Lords, 20th *April* 1709, under the Inspection of the Judges of *England*.

Sedition.

SEDITION is an irregular Commotion of the People, or Convocation of a Number of Citizens assembled without lawful Authority, tending

to

to disturb the Peace and Order of the Society. It is of different kinds; some Seditions do more immediately threaten the supreme Power, and the Subversion of the present Constitution of the State; others tend only towards the Redress of private Grievances. Among the *Romans* therefore it was variously punished, according as its End and Tendency threatned greater Mischief. See *l.* 1. *Cod. de seditiosis*, and *Matth. c.* 2. *n.* 5. *de læsa majestate.* And in the Punishment the Authors and Ringleaders were justly distinguished from those who with less wicked Intention joined and made part of the Multitude.

2. We have the same Distinction in our Law, and they have it still in the Law of *England.* Some kinds of Sedition amount to *High Treason*, and come within the Statute 25 *Edward* III. as a *levying War against the King.* Of this Character is the Sedition described in the 75th Act Q. *Mary*, ratified by *Act* 12. *Parl.* 10. *James* VI. consisting in the levying of an armed Force, and constituting them into a regular Body

Body with daily Pay. But of less Note is the *Sedition* mentioned in our other Statutes, as that of rising without Command of the Head-officer, to the Hindrance of the Law in the 77th Act *James* II. That of convocating Assemblies of Men, to treat of Matters of State, Civil or Ecclesiastick, in *Act* 131. *Parl.* 8. *James* VI. ratified by *Act* 4. *Sess.* 1. *Charles* II.

3. But that Species of Sedition which consists in *riotous* and *tumultuous Assemblies*, tending to the Breach of the Peace, and is founded in a late Statute of *Britain*, 1st *George*, *c.* 4. claims particular Attention. To constitute the Offence there must be, 1. A riotous Assembly to the Number of twelve at least. 2. They must be required to disperse by the proper Officer. 3. The Command to disperse must be made in the Form of making Proclamation by the Statute directed. And 4. There must be a continuing together for the Space of an Hour after Proclamation made. The proper Officers to make Proclamation are, with us, Sheriffs, Stewards,

Stewards, and Baillies of Regalities, or their Deputes, Magiſtrates of Royal Burrows, and all other inferior Judges and Magiſtrates, high and petty Conſtables, or other Officers of the Peace in any County, Stewartry, City or Town. And the Puniſhment of this Offence is *Death* and *Confiſcation of Moveables.* In *England* it is that of *Felony.* By the ſame Act it is made a capital Crime to *demoliſh* or *pull down*, or *to begin to demoliſh or pull down any Church or Chapel, or any Building for religious Worſhip tolerated by Law, and where the King, Prince and Princeſs of* Wales, *and their Iſſue, are prayed for in expreſs Words.*

Deforcement.

DEFORCEMENT is a reſiſting, or offering Violence to the Officers of the Law, while they are actually employed in the Exerciſe of their Functions, by putting its Orders and Sentences in Execution; whether they are Officers of the ſupreme Courts of Juſtice,

ſtice, as Heralds, Purſevants, Meſſengers, Macers; or of inferior Courts, as Mairs. See *c.* 4. *LL.* of *William.*

2. Touching this Crime, three later Statutes are particularly to be conſidered; *Act* 118. *Parl.* 7. *James* VI. *Act* 85. *Parl.* 11. *James* VI. and *Act* 152. *Parl.* 12. *James* VI.

3. The Perſons againſt whom this Offence is committed, are all the Officers employed in the executive Part of the Law, if they are reſiſted in the Execution of what is committed to them, whether they then wear any proper Badge of their Office or no; unleſs they are Meſſengers, who by eſtabliſhed Cuſtom are in uſe of wearing a Blazon, as the diſtinguiſhing Badge of their Office, whereby alone they are to be known, and without which, ſays *Mackenz.* it is believed they may be deforced, *n.* 3. *h. t.* But it is not neceſſary to uſe the Ceremony which Meſſengers ſometimes do, of breaking their Wand of Peace in token of Deforcement. *Murray* and *French*, 13th *July* 1669. But the Officer, if civilly

civilly asked, ought to ſhew his Warrant, elſe it ſeems to afford a tolerable Defence. See *Macken. ibid.*

4. The eſſential Characters of the Offence conſiſt in the Nature of the Reſiſtance itſelf, and the Time when it is made: For a Reſiſtance of an Officer of the Law on any occaſion, is no Deforcement, but only when he is acting in that Quality; and even then, every the ſmalleſt Non-compliance is not ſuch a Reſiſtance as infers the Crime. It muſt be an open and violent Reſiſtance, manifeſtly tending to obſtruct the Execution of the Summons, Letters, or other Warrant, if without the Effuſion of his Blood; but with it, the leaſt Act of Annoyance is a Deforcement, by the *Act* 152. *Parl.* 12. *James* VI.

5. Not only the Party againſt whom the Execution is intended, but any other acting under his Command and Direction, and even Perſons not intereſted, but officiouſly joining their Aid in the Deforcement, are all equally guilty of the Crime. Join with the *Act* 152. *Parl.* 12. *James* VI. the *c.* 4.

LL. Will. and *Act* 85. *Parl.* 11. *James* VI. Ratihabition is ſometimes ſufficient, where the Marks and Tokens thereof are manifeſt, and diſcover a Participation of the Crime. See *Macken. n.* 2. *h. t.* But this is to be received with Caution.

6. It is a Defence of no Weight, That the Officer acted without ſufficient Powers: Private Men in ſuch Caſe have nothing left, but to ſubmit and ſeek Redreſs in a regular way. Nor is it a good Defence, That the Execution of the Caption was in the Night-time. But a Suſpenſion of the Debt, or a Superſedere, if duly intimated, is a good Plea.

7. The Witneſſes of the Execution, tho' ſeemingly ſubject to an Objection, as intereſted, are yet habile Witneſſes in the Proof of the Deforcement, if they are not expreſly made Parties in the Libel, as being maimed or hurt. But the Officer's Execution of the Deforcement is no Proof of the Crime by itſelf; agreeably to the Opinion of many of the Doctors. See *Maſtard. Concluſio*

cluſio 189. *n.* 1, 2, &c. Although in civil Matters the Executions of Officers are probative till they are improven, yet an Execution is commonly given in with the Libel; tho' not needful to prove the Crime, yet as neceſſary to ſerve inſtead of an Execution of that which the Officer had in Charge, which tho' thus illegally prevented, is by Law held as compleat.

8. From all the three mentioned Statutes we gather the Puniſhment of this Crime, which is *Confiſcation of Moveables*, joined with ſome arbitrary Puniſhment, by Fine, Impriſonment, Baniſhment, or corporal Pains, according to the Degrees of Violence, and other Circumſtances which aggravate the Crime. The private Parties aggrieved have beſides an *Action of Damages*, to be highly taxed out of the firſt and readieſt of the Offender's Eſcheat, or other Eſtate; which civil Action is independent of the criminal Proſecution, and may proceed without it, upon a Proof of equal Weight. One half of the Offender's Eſcheat is, by the laſt

Act, given to the private Party at whoſe Inſtance the Caption or other Warrant was purchaſed; and it is thereby particularly provided, That the Execution thus prevented or interrupted, ſhall be held as compleated, lawful and orderly.

9. The deforcing Officers of the Cuſtom-houſe is puniſhable with Tranſportation to the King's Plantations in *America* for a Term of Years not exceeding Seven; and if the Offender return before the Term is expired, he is ſubject to a capital Puniſhment. 6 *Geo.* I. *c.* 20. § 34, 35. This Offence is only committed by acting in Company with eight or more Perſons tumultuouſly aſſembled in the Day or Night, and forcibly hindring, wounding or beating the Officer or Officers while they are employed in the due Execution of their Office; or by giving Aid and Aſſiſtance to ſuch Offenders. By § 7. of the ſame Statute, any Perſon oppoſing, moleſting, hindring and obſtructing any Officer or Officers of the Exciſe, in the due Execu-

tion

tion of the Powers given to them by Law, forfeits for every ſuch Offence the Sum of Ten Pounds: Which Offences may be heard, tried and determined either in the Court of Exchequer or in the Court of Juſticiary. *Ibid.* §. 44, & §. 9.

Breaking of Priſon.

ALTHOUGH we have no particular Laws concerning the Crime of *breaking Priſon*, yet we muſt admit it to be an Offence that is juſtly puniſhable: For the Knowledge of which, we muſt borrow our Lights from the *Roman* Law, ſince our own furniſhes us none to guide us.

2. This Crime can only be committed, by *breaking Priſon* in a proper Senſe; that is, by doing Violence towards the laying it open; in breaking down Walls, Doors or Windows; for to walk out unobſerved, by the Favour of the Keeper's Negligence leaving an open Door, is not within the Deſcription of the Laws touching this

Crime, *l.* 1. *ff. de effractoribus.* As there muſt be an Eſcape made, ſo the Action through which it is made, muſt in ſome reſpect or other be violent and forcible.

3. The Eſcape made, and the breaking of the Priſon, need not concur in the ſame Perſon to conſtitute this Crime; for he commits it, through whoſe Art and Stratagem, or other Aid, the Priſon was broke, to the End another Perſon might eſcape. The ſimple breaking, without an Eye to an Eſcape, is an Offence of its own kind, a Riot juſtly puniſhable; but is not this ſpecifick Crime. See *Maſcard. Concluſio* 265. *n.* 6. and *Menoch. Caſu* 391. *n.* 21.

4. As he does not commit this Crime who went out of Priſon unobſerved, ſo neither does he who fled out of Priſon, catching the Opportunity which favoured his Liberty, of the Priſon's being broke by another without his Participation; for his bare Silence does not involve him into the Guilt of the Crime, when the Danger of calling out to make a Diſcovery of the Eſcape of his

his Fellow-Priſoners, is ſo great, and might ſo probably coſt him his Life. See *Menoch. Quæſt.* 301. *n.* 26. Nor will ſuch an Eſcape infer a Confeſſion of the Crime for which he was committed; though *Clarus* gives it as the common Opinion of the Doctors, in his *Sententiæ, Quæſt.* 21. *n.* 25. See *Maſcard. Concluſ.* 165. *Menoch. ibid.* and *Macken. n.* 2. *h. t.*

5. If one has broke Priſon, and actually made his Eſcape, but voluntarily returns and gives himſelf up to the ſame Confinement from which he fled; the Doctors think, by this ſolemn Act of Repentance, he cancels this Crime of *breaking Priſon.* See *Clarus Sentent. Quæſt.* 21. *n.* 28. *Menoch. Quæſt.* 301. *n.* 13. *Maſcard. Concluſ.* 265. *n.* 21, 22, 23. and *Boerius Deciſ.* 215. *n.* 28. *Mackenzie* differs, *n.* 3. *h. t.* but it ſeems to be a favourable Caſe, becauſe 1. It is an Offence in its own Nature reparable by Reſtitution. 2. Much is to be indulged to the natural Deſire of recovering Liberty. 3. One ſeems not to have abſolutely deſerted a Place to which

which he shews a Mind afterwards to return.

6. The *Roman* Law seems to make the Punishment of this Crime capital. See *Matth. n.* 1. *h.t.* and *Carpz. Part.* 3. *Quæst.* 111. *n.* 93. But if the *Romans* punished this Crime with the Pains of Death, there has been certain Reasons particular to their State and Government, unknown to us, which has been the Cause of so great Severity, too hard for us to follow, who think an arbitrary Punishment, greater or less, according to the Circumstances of the Escape, and the Violence wherewith it was accomplished, sufficient and adequate.

Bigamy.

THE Laws of several Nations have allowed to the Man to marry more Wives than one; but the Law of no Nation has allowed a Woman to marry more than one Husband at one and the same Time: And the best Reason to be given for this seems to be,

That

That the last is repugnant to the Law of Nature, as being destructive of the Ties of Birth which are among the chief Bonds of Society, as tending to preserve an Union among Men for their own mutual Safety, and the Preservation of an Offspring so dear to them; for these Ties can only exist in a State that makes both Parents known with Certainty; which may be in the first Case, but is impossible in the last, wherein the Mother is only distinguishable: And 'tis now confirmed by long Experience, and the universal Practice of Nations in any measure civilized, that those Ties are preserved in greatest Vigour, and the domestick Affairs of Families carried on with greater Regularity and Tranquillity under the Conduct of one Mistris, than it could possibly be under the Direction of several of different Natures and Complexions. Thus the Conjunction of Two is become the highest and most perfect kind of Matrimony, against which the greatest Offence is *Bigamy*.

2. *Bigamy* is committed by a Man's being

being married at one and the same Time to more than one Wife, or by a Woman's being married to more than one Husband. The last is of the two the greatest Crime, as being incompatible with the Being of Society, and might be justly therefore punished with greater Severity.

3. It is much disputed among the Doctors, if *Bigamy* is Adultery. In the *Roman* Law it is called *Stuprum*, which consisted in the deflowring, without Violence, a Virgin or a Widow living decently, *L.* 18. *Cod. ad leg. Jul. de adulterio*, and *Matth. c.* 1. *n.* 13. *de adulterio*, *Menoch. casu* 420. It seems to have been only punished among the *Romans* as *Stuprum*, which, if much aggravated, was even punished capitally. But a lesser Punishment is more consistent with the *Jewish* Law, wherein the Prohibition of *Adultery* was perpetual, that of *Polygamy* temporary only. See *Selden, lib.* 1. *c.* 9. *de uxore Hebraica*. The perpetual Prohibition of the one as a hainous Crime, and the temporary Permission of the other are never

never to be reconciled, if both were equally criminal, or the ſame Crime. In *Germany*, *Holland* and *Spain* it is differently puniſhed. By a Conſtitution of *Char.* V. it was a capital Crime. In *England* it was made Felony, by *Ja.* I. *c.* 11. but with Benefit of Clergy.

4. According to our Law, the criminal Fact in *Bigamy* conſiſts in the Perjury which it implies, as being a manifeſt Violation of the matrimonial Oath; and it is puniſhed in the ſame Way as Perjury, with Confiſcation of Moveables, Impriſonment for Year and Day, or longer at the King's Will, and Infamy, *Act* 19. Q. *Mary*. The Crime is but ill defined in this Statute, for want of Language, but the Meaning is plain enough, to ſhew that a Man's marrying a ſecond Wife, or a Wife a ſecond Husband, during a ſtanding Marriage with a former Wife, or former Husband, is *Bigamy*.

5. By a ſtanding Marriage is meant, one formally ſubſiſting at the Time; for *Bigamy* is committed, whether it is reducible for Adultery, or ſubject to be

decla-

declared null *ab initio*, for Impotency or Contingency of Blood; yet in the last the Case of the *Bigamist* is favourable, especially if the former Marriage is actually declared null, before the Process for the *Bigamy* is commenced. See *Macken. n. 5. h. t.*

6. The guilty Person divorced, by marrying after the Divorce, does not commit *Bigamy*; because by our Law the guilty Person may lawfully marry any other than him or her with whom the Adultery was committed, upon which the Divorce proceeded, *Act* 20. *Parl.* 16. *Ja.* VI. And through what Means soever, true or false, a Divorce may have been obtained, a Man thus formally *solutus* for the Time, cannot commit *Bigamy*, though the Divorce should afterwards be reduced.

7. It often happens that one of the Parties, ignorant of the former Marriage of the *Bigamist*, is altogether innocent, and will not incur the Guilt of this Crime, if the Cohabitation is timely interrupted upon a Discovery of the *Bigamy*. Sometimes a long Absence of the

the injured married Party, which gives Reaſon to believe his Death, pleads a Mitigation of the Puniſhment; ſo does the not conſummating of the *bigamous* Marriage, and Deſertion of the former Spouſe. See *Carpzov. Part.* 2. *Quæſt.* 66. *n.* 61, 62, 63.

Adultery.

AS the Ties ariſing from Marriage are among the chief Bonds of Society, ſo the matrimonial Contract is an Inſtitution of the greateſt Uſe, and the moſt ſubſervient to the Intereſts of Mankind. Next to *Bigamy*, *Adultery* is the Crime which chiefly offends againſt it, as having a manifeſt Tendency to ſubvert the Peace of Families, to confound and perplex the Relation of Kindred, and to deſtroy that decent and comely Order which is neceſſary to preſerve the Tranquillity of Societies, without which, it is impoſſible they could ſubſiſt.

2. The firſt Law againſt *Adultery* among the *Romans*, is ſaid to be owing

to the Founder *Romulus*. *Gellius* 10. *c.* 23. has preserved the Words of an ancient Law against this Crime, from a Speech of *M. Cato*; by which it was lawful to the Husband to kill his Wife whom he surprised in the Act of *Adultery*. The next was made by *Augustus*, and is well known by the Name of the *Julian* Law; it mentions *stuprum*, as well as *adulterium*. The first, was the deflouring, without Force, of a Virgin, or of a Widow living decently: The last, of a married Woman. The *viles personæ* were not within the *Julian* Law, as not being *matresfamilias*, *l.* 29. *Cod. h. t.* which is agreeable to the *Mosaick* Law, that did not permit a capital Punishment to be inflicted upon those who had lain carnally with a Bond-maid betrothed to an Husband, because she was not free: Nor could Adultery be committed with an open Prostitute, *l.* 22. *Cod. h. t.* But it might with an unlawful Wife, not with a Concubine, *l.* 3. *ff. de Concubinatu.* The Interpreters are not well agreed about the Punishment of the *Julian* Law: Some think

think it was capital; others, that Sort of Baniſhment, which they called *Relegation.* See *Matth. c.* 2. *n.* 1. *h. t.* Whatever it was, it ceaſed in the Caſe of a Woman's marrying a ſecond Husband *bonâ fide*, after a long Abſence, believing her former Husband to be dead; becauſe without Dole the Crime could not be committed. It is clearly decided in the Civil Law, that *Adultery* might be committed with a Bride, *l.* 13. § 3. *ff. h. t.*

3. It is a Queſtion much diſputed, whether one commits *Adultery* by the Violation of an unmarried Woman; that is, whether the Husband commits *Adultery*, when he confines himſelf to the Embraces of the unmarried. Many and various are the Arguments on each Side, by Lawiers and Divines of great Name; which ſeem chiefly to reſolve into a Diſpute about a Word, and if the Husband's Crime in this Caſe is properly called *Adultery.* But to enter thoroughly into this Matter, we muſt reſolve it into three Queſtions. 1. Whether ſuch Action of the Hus-

band is properly expreſſed by the Word *Adultery*? It would ſeem not, *quia adulterium in nupta committitur, l. 6. ff. h.t.* And it is clearly never eſteemed *Adultery* in the Civil Law. 2. Whether a Husband thus deſerting his own Bed, or the Wife's admitting one into the Bed of her Husband, is the moſt criminal Action? The Conſequences in the one Caſe, not to be found in the other, namely, a deteſtable Confuſion of the Principles of Generation, ſuppoſititious Iſſue, the Diſgrace of Families ariſing from a doubtful Legitimacy, and the Deſtruction of the Ties of Birth thence proceeding, make the laſt the moſt criminal. 3. If ever ſuch an Action of the Husband was puniſhed with Death? of which it will be hard to find an Example in the affirmative; yet by the Sanction of the Divine Law, as well as the Civil, we find the Puniſhment of Death inflicted upon the Wife and her Adulterer. See *Matth. c. 1. n. 12. h.t.* and *Carpzov. Part. 2. Quæſt. 52. n. 49.*

4. The Diſputes concerning the Puniſhment of the *Julian* Law, are happily

pily removed by a Constitution of *Constantine*, which made Death the Punishment of this Crime, *l.* 30. § 1. *Cod. h. t.* But unworthily, in the Opinion of *Matthæus*, broke in upon by *Justinian*, in the 134 *Novell. c.* 10. See *Matth. c.* 2, *n.* 112. *h. t.* It was peculiar to the *Roman* Law to permit the Husband and Father, in certain Cases, to kill the Wife or Daughter whom they surprised in the Commission of the Crime.

5. According to our Law, the Husband who enjoys an unmarried Woman, as well as the Wife who admits a Stranger to the Bed of her Husband, commits the Crime of *Adultery*. The Description of the Crime by *Mackenzie*, in his Preamble to this Title, seems to point chiefly at the Violation of a married Woman, as the Fact wherein this Crime consists; for the last Part of it is applicable to the Case of a married Woman, as well as the first, but no Part of it is applicable to the Case of a single Woman lying with a married Man. And it is observable, that most Authors describing this Crime in general, fall

into a way of ſpeaking, which ſeems to preſuppoſe, as if it conſiſted only in the Violation of a married Woman. See *Carpzov. Part.* 2. *Quæſt.* 52. *n.* 42, *& ibid. notat.* Even thoſe, who when they come to explain themſelves, hold the contrary Opinion; witneſs *Carpzov. ibid. n.* 4, 6, 9, 10, 12, 13, 14, 24. *& Quæſt.* 51. *n.* 45, 46, 47, 49, 25, 29. But what is ſtill more remarkable, all the Laws of *Moſes* touching this Crime, ſpeak only of the Violation of a married Woman, or one betrothed, *Levit.* xx. 10. *Deut.* xxii. 22, 23, 24.

6. It is juſtly likewiſe eſteemed *Adultery* with us, following the Law of God, *Deut.* xxii. 23, 24. And the *Roman* Law, *l.* 13. § 3 & 8. *ff. h. t.* to violate an eſpouſed Virgin, or, as we ſay, an affidate Spouſe, as being an Act equally criminal, and productive of the ſame Miſchief, to violate the Hope of future Matrimony, as to violate the Matrimony it ſelf; yet though it might be pled *a pari*, as our Law ſtands, that the affidate Husband or Bridegroom violating

olating an unmarried Person, was thereby guilty of *Adultery*, I doubt if it would be found; for no Man can properly be said, by any such Action of his, to violate the Hope of his own Matrimony.

7. The *Roman* Law made a Distinction of Persons in the Commission of this Crime; for the Crime could not be committed upon Women of low and abject Condition, nor common Prostitutes; which we reject: But in this Case we would agree, that an unaffected Ignorance in the Man of the married State of the Woman, would save him from the Punishment of the Law, upon the common Principle, that *Adultery* cannot be committed without Dole.

8. In our Law, notour *Adultery* is opposed to simple *Adultery*: The Punishment of the last is arbitrary; that of the first is Death. Every *Adultery* which is not notour, is simple; and notour *Adultery* is discoverable by three different Characters: The first is, Children procreated between the Committers: The second is, keeping Company noto-

notoriouſly together at Bed and Board: And the third is, Non-compliance with the Admonition of the Church, to abſtain after Excommunication firſt pronounced for Diſobedience. See *Act* 74. Q. *Mary*, and *Act* 105. *Parl.* 7. *Ja.* VI. Caſes of ſimple *Adultery* may be figured a great deal more heinous than ſome of thoſe which fall under one or other of the Characters of notour *Adultery*; yet it is not likely the Judges would in any Caſe puniſh ſimple *Adultery* with the Pains of Death, as not being within the Letter of any Statute: For in criminal Caſes, Puniſhments are not farther to be extended than the Law expreſly directs, becauſe of the Severity of the Concluſion.

9. *Bigamy*, in a proper Senſe, is *notour Adultery* in all its Forms; and tho' it cannot be puniſhed with Death, as *Bigamy*, according to our Law, yet it may be ſo puniſhed as *notour Adultery*, ſince it participates of its eſſential Characters. The outward Figure of Matrimony here only interpoſed in all Probability to ſcreen the Offender from

the

the Punishment of Adultery, or to facilitate the Gratification of his unlawful Desires, which an innocent Party without such Deceit had never complied with, is so far from affording a Defence, that it aggravates the Crime. See *Menoch. Casu* 420.

10. Presumptive Proofs are here justly admitted, because the Crime is *studiously committed* by mutual Consent, with the utmost Privacy: And the received Presumptions, such as *nudus cum nuda*, being oft alone together with close Doors, interchanging Love-Letters, and the like, are so pregnant of Evidence as must needs carry Conviction: And the established Chastity of outward Behaviour is such, that Persons truly virtuous are in no danger of suffering by this Latitude in the Means of Proof. But as this Crime may be prosecuted on different Views, civilly or criminally, a Proof of less Strength will suffice in the first Case than in the last.

11. A Decreet of Divorce obtained before the Commissaries, on the Head of

of *Adultery*, will be no Proof of the Crime before the Juſtices, as a Decreet of Improbation obtained before the Lords of Seſſion would be of Forgery; the Caſes being altogether different, and the Divorce being the Sentence of an inferior Court ſubject to Reduction.

12. An Offender indicted for *notour Adultery*, and the Proof amounting only to *ſimple Adultery*, the Aſſize ought to acquit, becauſe *ſimple Adultery* lyes not before them. But if both are libelled, the Proſecutor will be allowed to inſiſt alternatively; which however is a matter of Indulgence not free from Objection: For tho' there is ſome appearance of Reaſon in allowing a Libel alternatively to conclude in one or other of two Crimes which are greater and leſs of the ſame kind; yet an alternative Concluſion at any rate, with all Deference to our preſent Practice, ſeems to be a thing too vagrant to find place in criminal Proſecutions, where Mens Reputations, Lives and Fortunes are at ſtake.

13. Perſons divorced for *Adultery* are diſabled

disabled from marrying those with whom they are *declared by the Sentence of the ordinary Judge to have committed it, Act* 20. *Parl.* 16. *Ja.* VI. and the Issue of such shameful Conjunction is incapable of Succession, as wanting Legitimacy. Women divorced for Adultery, keeping Company with their Adulterer, are disabled by any Deed to dispone their Lands, or set Tacks, in prejudice of their Heirs; yet Men in the like Case are under no such Prohibition: The want of Chastity in the other Sex, which is their capital Virtue, argues an Absence of many other Virtues; but that cannot with equal Justice be said of the Men, as we may learn from daily Observation, which I take to be the Reason why in this Clause of the Act the Men are so remarkably distinguished from the Women.

Rape.

ALL Violence of what kind soever is criminal; but it becomes more so,

ſo, when the Perſons upon whom it is committed are particularly taken into the Protection of the Law, becauſe of the Imbecillity of their Sex and Condition, or when that is ſtruck at which is of the greateſt Moment to them to preſerve untainted: Thus the common Sentiments of Humanity incline us to eſpouſe the Cauſe of the weak, and to place them in greater Security.

2. This Spirit ſhines forth in the Conſtitution of *Juſtinian*; for the Puniſhment of *Rape* in that ſingle Law of the *Code*, *de raptu virginum*, was thereby made capital, becauſe *Chaſtity violated* was incapable of Reparation; and thoſe who aſſiſted in *ipſa invaſione*, were ſubject to the ſame Puniſhment, who, as well as the Raviſher, being ſeized in the very Commiſſion of the Crime, might be killed with Impunity by the Parents, Tutors, Curators or Patrons of the Virgin or Widow. According to the Civil Law, the Crime conſiſted in the *violent Seizure*, or *carrying off the Perſon*; yet vainly does *Matthæus*, and ſome of the Doctors, hold,

hold, that Women were capable of committing this Crime: For although the *Rape* consisted in the violent Abduction of the Person, without respect to the subsequent Pollution, whether it was prevented or not; yet the Law had an Eye to the Possibility thereof, and the great Pangs of the Party by reason of the likelihood of what was to follow, else the Crime had never been construed to consist in the simple Abduction. Besides, the Rubrick and whole Strain of the Constitution is a sufficient Confutation. See *Matth. n.* 1. *h. t.* Though the Word *RAPE*, in its Original, implies *a violent carrying off the Person from one Place to another*, and is here applied to signify this Crime, because in the Commission thereof there was a violent Abduction, since it could not be so safely committed in the Place where the Prey was found; yet if it was perpetrated in the Place, the Ravisher was within the Meaning of the Constitution. See *Matth. n.* 7. *h. t.*

3. From the *Regiam Majestatem* we

gather the Definition of a *Rape* to be a Crime which a Woman alledges againſt a Man, affirming that ſhe was polluted violently by him, contrary to the King's Peace; which muſt be forthwith diſcovered and proſecuted, 4 *B.* 8 *C.* But from this immediate Proſecution, later Practice recedes. The Puniſhment thereof is capital, as being one of the four Pleas of the Crown which are ordained to be puniſhed with the Pains of Death. Join the 4 *Act*, 21 *Parl. Ja.* VI. The Woman's ſubſequent Declaration of Conſent will ſave the Offender from capital Puniſhment, but not from an arbitrary one *ad vindictam publicam*, if there was truly a Rape. See the Act. The Deſcription of the Crime in the *Regiam Majeſtatem* plainly infers that Men can only commit it; yet ſome, miſtaking the Meaning of the 9th *ver.* of the ſaid *Chap.* of the *Majeſty*, affirm, that Women, as well as Men, are capable of committing it; for the Word *fadari* refers not to the Crime, but to the Marriage there ſpoke of.

4. It is not without great Reaſon

that

that the Civil Law construes the Crime to be committed by the Ravishment or violent carrying off the Person, when we consider the Horror and Anguish which a Woman of Virtue must feel while she is under the Power of her Ravisher, and in constant Terror at the approaching violation of her Chastity; of which the other Sex, bred up to greater Liberties, can have but a faint Notion: Yet as our Law places the Crime of *Rape* in the actual deflowring a Woman by Force, the simple Abduction cannot be punished capitally by our Law, but can only receive an arbitrary Punishment as an Offence of its own kind, according to the Violence used, and other Circumstances of the Case.

5. Although the Law of the *Majesty* did not permit the Expiation of the Crime by an Inter-marriage, except with the King's Licence, or his Justiciars, and Consent of Parents, before any Doom or Judgment given; yet that seems to be quite altered by the Act of *Ja.* VI. For if the Woman by

diſſembling the Injury done her, may according to that Law ſave the Life of the Raviſher, there's nothing to hinder them to marry; for Marriage in that Caſe, without the King's Licence and Parents Conſent, was only diſallowed by the Law of the *Majeſty*, for this Reaſon, That if it had been permitted, it would have conſequently amounted to the giving the Offender his Life.

6. The Attempt to commit this Crime upon a Perſon under Puberty, ſeems to be juſtly puniſhable as the Crime itſelf in other Caſes actually committed, according to the Opinion of the Doctors. See *Carpz. Part.* 2. *Q.* 75. *n.* 30. *Menoch. arbitrar. judic. lib.* 2. *cent.* 3. *caſ.* 294. *n.* 7. And *Minority* in a Raviſher ſeems to be a Reaſon of Aggravation rather than of Excuſe. See *Mackenzie, n.* 9. *b.* 1.

7. With reſpect to common Proſtitutes, we may juſtly follow the *Roman* Law, which did not comprehend them within *Juſtinian*'s Conſtitution. *Carpzovius* ſeems to argue ill in his 75 *Quæſt.* 2 *Part.* for a common Whore

is

is incapable of suffering that Violence which truly constitutes the Atrocity of a *Rape*, after having lost the Delicacy which alone makes such Violence a *cruciating Agony*. And though we approve not the Reason of the Civil Law touching the *viles personæ*, who were esteemed beneath its Care, which was owing to the Notion of *Slavery* that prevailed among the *Romans*, contrary to our juster way of thinking, That the Law extends its Care to all without Distinction; yet may we justly hold, that Prostitutes are not entitled to the Benefit and Protection of the particular Laws made in favour of *Chastity*, who offend so remarkably against them, *Macken. n.* 9. *h. t.* Which however is offered only as a reasonable Opinion upon a Point not yet established by our Practice.

Incest.

THIS Crime consists in the *carnal Knowledge* of Persons nearly related to each other by Blood or Al-

liance. The *inceſtuous Conjunction* of Aſcendents and Deſcendents, ſeems to offend againſt the natural Law, as being deſtructive of the Ties of Birth; that of Collaterals and Relations by Alliance, againſt poſitive Law, founded on this Conſideration, That if Kindred were not thus prohibited, who have ſo frequent an Opportunity of being together, without a watchful Eye to reſtrain their Familiarities, the Laws of Matrimony, or the eſtabliſhed and regular Methods of Propagation which are among the chief Bonds of the Society of Mankind, would every Moment be ſubject to be tranſgreſſed. See *Grotius*, *lib.* 2. *c.* 5. § 12. *n.* 2. and § 13. *n.* 3.

2. In the civil Law two different kinds of *Inceſt* were diſtinguiſhed, that which was prohibited by the *jus gentium primævum*, or natural Law, and that which was an Offence againſt civil or poſitive Law. The firſt prohibited the Conjunction of Aſcendents and Deſcendents *in infinitum*; and of thoſe in like Degrees by Alliance, *ut.*

ult. ff. de ritu nuptiarum; and of the collateral Relations of the firſt and ſecond Degree. The laſt prohibited the Conjunction of collateral Relations in the third Degree, and of the near collateral Relations by Alliance. See *Matth. n. 3. h. t.*

3. The Puniſhment of *Inceſt* in the Civil Law, of old varied a little in different Caſes, according as it offended againſt the Law of Nations, or the Civil Law, and as the Men or Women were to ſuffer it: For Ignorance of the Civil Laws was leſs excuſable in a Man than in a Woman. See *Matth. n. 5. h. t.* The generality of the Doctors agree, that the Puniſhment of *Inceſt* is the ſame with that of *Adultery*: From which it will follow, that the Puniſhment of *Adultery* being made capital by later Conſtitutions, that of *Inceſt* muſt be the ſame; yet all do not agree. See *Carpz. Part. 2. Quæſt. 72.*

4. According to our Law, the *prohibited Conjunctions* ſtand thus; All the Conjunctions of Kindred in the direct aſcending and deſcending Line *in infinitum*,

finium, are inceſtuous; and all Conjunctions of Collaterals in a nearer Degree than that of Couſins-german; and the like Degrees in Affinity are prohibited, as in Conſanguinity. But the Relation of Affinity created by Intermarriage, is confined to the very Perſons themſelves, and does not extend itſelf to their Relations by Blood or Alliance. Thus the Wife of our Brother is our Siſter by Affinity; but her Siſter, or her former Husband, is nothing to us, *Levit.* xviii. and *Act* 14. *Part.* 1. *James* VI. Thoſe of whom we are deſcended, or who deſcend from us out of lawful Wedlock, are not our lawful Kindred, and come not within theſe Prohibitions; for the Maxim, *pater eſt quem nuptiæ demonſtrant*, ariſes not from poſitive Law, but owes its Origine to the ſecondary Law of Nature, or is one of the firſt Foundations of Societies, which is the ſame thing: And ſince their Kindred are not by any Rule known in Law diſtinguiſhable, their Conjunction can never be ſaid to be *inceſtuous*; yet as the Birth di-

diſtinguiſhes the Mother with Certainty, her lawful Kindred are the natural Kindred of the Child, and Conjunctions between them may with ſome Reaſon be proſecuted as *inceſtuous*; for here *Carpzovius*'s Reaſon may take place, *Part.* 2. *Quæſt.* 72. *n.* 35. *Sanguinis communitas in his prohibitionibus attenditur.*

5. The bare Attempt to commit this Crime is not puniſhable as the Crime itſelf, according to our Law; for the Words of the Statute, *viz. abuſes his Body*, ſuppoſe the real and actual Commiſſion of the Crime: The bare Endeavour is a Matter of difficult Proof, and in criminal Caſes it is as much as poſſible to be avoided, to put the Queſtion upon Points which cannot be tried with any meaſure of Certainty.

6. As we have no Statute againſt *Sodomy* and *Beſtiality*, the Libels of theſe Crimes are founded upon the Divine Law: Our Practice has made *burning alive* to be the Puniſhment of both.

7. We do not agree to the Rule laid

laid down by *Carpzovius*, That in Crimes of the Flesh, which cannot be committed but by the Participation of two, the Confession of one makes no Proof sufficient for inflicting the ordinary Punishment of the Crime; for the Confession of one is always good against him who makes it. See *Carpz. Part.* 2. *Quæst.* 72. *n.* 52.

Wilful Fire-raising.

THE Crime of *Wilful Fire-raising*, may well claim the first Place in the fourth Class of Crimes, whether we consider the Danger it threatens to the Lives as well as the Estates of Men, and the Devastation it may occasion in Towns and Places of great Resort; or the extreme Wickedness of the Motives to which alone they can be owing, and which are so much the more nefarious, as they are stript of the ordinary Incitements which tempt Men to commit other Crimes, being without any Prospect of Gain or Pleasure, other than the execrable Gratification of being revenged

venged of one ſingle Perſon, though perhaps with the utter Ruin of Hundreds. To theſe Conſiderations it is owing, that our Law before the Union made this Crime to be deemed *High Treaſon*; for, ſays the *Stat.* 8. *J.* V. *ſik Deeds are exorbitant, and mair againſt the Commonweal than many other Crimes.*

2. A *wilful Fire-raiſer*, or *Incendiarius*, as deſcribed by the Doctors of the Civil Law, is he who maliciouſly and with a wicked Intention raiſeth Fire, either by kindling it with his own Hand, or by giving Command to another to do it for him; or who executes ſuch like Command given by another. See *Matth.* § 1. *h. t.* And becauſe of the Enormity of this Crime, and the dreadful Conſequences which may follow it; ſince the Flame once kindled, *longius evagando*, may ſoon paſs all humane Controul, and ſpread around its Deſtruction, many of the Doctors are of Opinion, that even the Attempt to commit this Crime is puniſhable: But as every Kind of *Fire-raiſing* is not equally atrocious, ſo neither is the Attempt

tempt to commit the leſſer Crime, to receive the ſame Puniſhment, which the attempting the greater juſtly demands. Well therefore does *Matthæus* judge, in leaving to the good Senſe of the Perſon to whom the Execution of the Law is committed, thoſe Matters which would require a Multiplicity of Rules of the moſt difficult Application to govern them, that he may inflict either a capital, or ſome gentler Puniſhment, as the Circumſtances of the Caſe duly pondered may ſeem to require, § 3. *h. t.*

3. By the *Roman* Law this Crime was differently puniſhed, according to its different Degrees of Enormity: They who committed this Crime in a Town, out of Enmity or Revenge, or *prædæ cauſa*, were burnt alive; but they who ſet Fire only to a ſingle Houſe in the Country, were more mildly dealt with: And if the Burning was owing ſolely to Negligence, a civil Action only lay for the Reparation of private Damage, *l.* 28. § 12. *ff. de Pœnis.*

4. As Fire is more frequently raiſed

ſed through Negligence and Inadvertency, than out of any wicked Purpoſe, ſo we juſtly place the Characteriſtick of *Fire-raiſing* in the wicked Purpoſe to which it is owing: And hence it is in our Law called *wilful Fire-raiſing*, Thus *Skene* calls it, in rendring the 11. *Chap.* of the Laws of *Mal.* II. into our Language; the expreſs Words of which do ſufficiently mark this eſſential Character, where *Fire-raiſers* are called *Combuſtores domorum nequiter & malitiosè.*

5. Although none of the Species's of *wilful Fire-raiſing* are now Treaſon in our Law, yet it is of Importance to conſider them, becauſe ſuch and ſuch only are now to be deemed capital Crimes by the *Act 7 Annæ, c.* 21. For every the leaſt Act of *wilful Fire-raiſing* was not Treaſon by our Law. See *Macken. n.* 5. *h. t.* and the Caſe there referred to. Nor is ſuch therefore to be deemed a capital Crime now.

6. We diſtinguiſh plainly three different Species's of this Crime, declared Treaſon by the *Act* 8. *J.* V. and *Act*

33. *Parl.* 1. *Ja.* VI. *The burning Folks in their Houses*; that is, the burning Dwelling-houses, where People are probably lodged, although for the Time they happen not to be there. 2. *Burning either Houses or Corns*: By Houses here are meant other Houses than those designed for Habitation; such as Barns, Stables, Granaries. 3. *Wilful Fire-raising in general*, as distinguished from the burning a particular House, or Quantity of Corn: Thus one may maliciously kindle a Parcel of Heather or Broom, with an Intention, that the spreading Fire should reach an adjacent House or Corn-yard. See *Macken. n.* 5. *h. t.* Burning Coal-heughs was made Treason, as well because of the great Benefit to the Society, from the Feuel they produce, as that such Fires once kindled, were never likely to be extinguished, *Act* 148. *Parl.* 12. *Ja.* VI. These are the Species's of this Crime, which are declared by the *Act* 7 *Anne*, subject to be punished with such Pains, as by the Law of *Scotland* are inflicted upon the Committers of capital

capital Crimes and Offences. And the ſetting on Fire, burning, or cauſing to be burnt Wood, Under-wood or Coppice, is by an *Act* 1 *Geo. Seſſ.* 2. *c.* 18. puniſhable, as *wilful Fire-raiſing* is declared to be by the foreſaid *Act* 7 *Anne.*

7. How much ſoever it may have pleaſed the Doctors of Law to diſpute the Queſtion, if a man was an *Incendiarius*, who ſet Fire to his own Houſe, ſince *quilibet eſt rei ſuæ arbiter*; yet it ſeems to be a Point of no great Difficulty to determine. In the juſt and rational Uſe of our Property, the Law gives us an unlimited Power; but in ſuch wild, capricious and deſtructive Uſe thereof, it can never be ſaid to protect us. A wicked Perſon, whoſe Timidity is not leſs remarkable than his Spite, might be tempted, even to ſet Fire to his own Houſe, in Hope of burning his Neighbour's with Impunity; and who would heſitate to pronounce him a *wilful Fire-raiſer* in a proper Senſe? If ſuch indeed was the Situation of one's Houſe, which he wan-

only kindled into a Flame, as by no Possibility could occasion Harm to any Person besides himself, it might be doubted if he was a *wilful Fire-raiser* within the Meaning of these Statutes: But I apprehend it would be no Question, that he were justly subject to an arbitrary Punishment at the Instance of the Crown; not only because of the *dominium directum* in the Sovereign, but also, because the publick Good will not permit such Abuses. See *Macken. n. 3. b. t.*

8. As Design and Dole, the essential Character of this, as well as of other Crimes, are Acts of the Mind, which may therefore be inferred from Presumptions; yet how atrocious soever the Crime it self may be, the external Acts by which it is committed can only be proved by Witnesses or Confession: A presumptive Proof affords but too slender Evidence for the Proof of Facts so capable of a clearer one, and where the Necessity of having Recourse to Presumptions is not pressing.

9. The *Act 75. Ja.* I. provides a suitable

able Punishment for Servants, who in Towns by Misgovernance, and not of set Purpose, burn the House of their Master; and for the Master, who himself, his Wife or Children, *recklessly* burns his own House, or the House which is let to him. The Punishment of the Servant, if he hath no Goods wherewithall to repair the Loss, is scourging and Banishment from the Town for three Years: That of the Master, is Banishment from the Town for three Years. And he to whom the House was let, thus offending, must suffer the like Banishment for three Years, and repair the Skaith. As the Words in the Act, of *Misgovernance* and *recklessly*, have a Punishment annexed to them, they seem to imply the *culpa levis* in the *Roman* Law, rather than the *culpa levissima*. See *Mackenz.* 10. *h. t.*

Murder.

AMONG the absolute Duties which oblige all Men antecedently to all

humane Inſtitution, this is the moſt capital, and at the ſame Time the moſt obvious, that we ſhould do no Hurt to one another, or abſtain from doing that to our Neighbour, which, if done to our ſelves, Nature would prompt us to repell: And among all the Benefits which ſhe beſtows, that of Life is the one which we guard againſt Injuries with the readieſt Hand. Without the Obſervation of this grand Precept, we can have no Notion of the Continuation of a ſocial Life. This is the great Fence of humane Societies; and if there is any one Thing more eſpecially intended to be ſafe under its Protection, it is our Life.

2. The Crime of *Murder* was puniſhed among the *Romans* by the *Cornelian* Law. Murderers were called *Sicarii*, *a Sica*, a ſhort Poynard they made uſe of for the Execution of the wicked purpoſe; yet the Name was made uſe of to comprehend thoſe who killed by other Means, and who were deſignedly, by falſe Teſtimony, or falſe

false Judgment, the Cause of taking a Man's Life unjustly.

3. Of all Murderers, the Assassines, who for a Hire let out their wicked Labours, are the most detested; in whose Crime there is such execrable Villany, to kill in cold Blood for love of Money, that it is pretty much agreed as just and reasonable to punish in them the very Attempt, or undertaking to kill, though they happen in the Event to be disappointed, *Gomes. Resol.* 3. *n.* 10. which distinguishes their Case from that of a Mandant or Mandatary of Slaughter, in whom the bare Attempt or Endeavour is not punishable, for want of the essential Character, the Prospect of Hire or Reward, which is the distinguishing Mark of an Assassine, and wherein the Atrocity of the Crime consists.

4. The *Cornelian* Law against *Homicide* regards Nature itself, and extends its Protection to Humanity in general; and thence it is, that the Murder of Slaves, as well as of free Men, was thereby intended to be avenged. But while

while it extends to the whole Species, yet Monsters in a proper sense are excluded; of which see the Definition of *Ulpian*, *l.* 135. *ff. de verb. signif. Matth. c.* 1. *n.* 6. *h. t.*

5. He is even a Murderer who kills himself, through what Cause soever he may be tempted to so unnatural an Action: For tho' some of the Antients thought that one might justly sometimes prefer the Incitements to die to all the Inducements to live which this Life can possibly afford, as in the Case of *Corellius* noted by *Pliny* in his 12 *Ep.* 1 *Book*, and tho' in some Cases justified among the *Jews*, from the Example of *Samson* and *Saul*, yet when examined to the bottom, it will be found entirely owing to Pusillanimity, and a Choice of that which for the present appears less painful, to avoid a greater Pain; or a Choice of one Pain rather than an apprehended Continuation of it: For it is owing to the same Fearfulness and Cowardice the desiring Death when we ought not, as the refusing it on a proper Occasion, and undoubtedly a high

Offence

Offence againſt the Law of Nature; of which the only Puniſhment can be inflicted, is ſome Mark of publick Diſgrace upon his Memory, which has its own Effect, as we read in the noted Caſe of the *Mileſian* Virgins.

6. Although the *Cornelian* Law conſulted the Safety of Mankind in general, yet there were Perſons in certain Caſes who might be killed with Impunity; and theſe may be diſtinguiſhed into three Claſſes: 1. The notorious Enemies of the Commonwealth, who with an Intention remarkably hoſtile invaded their Country. 2. Nocturnal Thieves, and Night-plunderers, and Pillagers of Lands. 3. The Adulterer ſurprized in the Commiſſion of the Crime, by the Father or Husband of the Woman; and the Raviſher ſeized by certain Relations in the violent Abduction, while the Rape was flagrant.

7. By the *Roman* Law, at firſt, Perſons of different Rank were for this Crime differently puniſhed, by Deportation, Relegation, or Death; but at length Perſons of all Ranks were puniſhed

niſhed without Diſtinction with the Pains of Death, if the Crime was committed through Dole, to which the greateſt Omiſſion, or moſt ſupine Neglect, was not accounted equal.

8. The Law diſtinguiſhes three kinds of *Homicide*; that which is treacherous and intended, *doloſum*; that which is culpable and blame-worthy, *culpoſum*; and that which is abſolutely fortuitous and caſual, *caſuale*. The *firſt* we ſhall diſtinguiſh by the Name of *Murder*, the *Second* by that of *Manſlaughter*, and the *Third* we ſhall call *caſual Homicide*. *Murder* is known by the Dole and Treachery which produces it; well defined that which is intended to kill, or even to wound, if Death follow, *Carpzov. Part.* 1. *Quæſt.* 27. *n.* 5. and can admit of no milder Puniſhment than Death. *Manſlaughter*, as not owing to Dole, or any premeditated Intention, but to ſome Fault, Omiſſion or Neglect, is puniſhed arbitrarily with greater or leſs Severity, according to the greater or leſſer Fault to which it is owing. *Caſual Homicide* is that

which

which without the least bad Intention, or even the least Fault, unfortunately happens, and therefore can receive no Punishment. The *casual Homicide* is not hard to discern; for what happens through mere Mischance, carries always some strong Characters to make it known. It may not be so easy to judge of *Manslaughter*, for sometimes the Fault or Omission to which it is owing, is so small as hardly to take it out of the Class of *casual Homicide*: Of which therefore it is fit to distinguish three kinds; 1. That which tho' accidental, yet is committed by a Man while he is unlawfully employed. 2. That which tho' accidental, and happening from the Hands of one lawfully employed, is yet owing to the Omission of some reasonable Precaution, which would have prevented the *Homicide*. And 3. That which is absolutely *casual*. The first two call for some Punishment, the last for none. Sometimes the Civil Law did not even punish that Murder which was intended, if it was owing to a sudden Effort

or *impetus* into which one was ſurprized out of juſt Indignation. See *Matth. c. 3. n. 4. h. t.*

9. It is every where agreed, that the Puniſhment of this Crime ceaſes in the Caſe of him who is obliged to kill his Aggreſſor to ſave himſelf. The Obligation of theſe Laws which enjoin Peace, bind all alike: The Duty is mutual; and if it is upon one Side violated, a Right is created to him who ſuffers by the Violation, to repell the Force that threatens him. As theſe Laws of Peace are univerſally binding, the obedient are entitled to exact that Performance, which the diſobedient are unwilling to pay, ſo far at leaſt as Self-preſervation demands. However the Bounds of violent Self-defence are much more ſtinted in a State of civil Society, than in that of Nature: For in regular Societies, the Means of Self-defence are often to be found in the Execution of the Law; and it is only in Caſes where the Aid of the Law would come too late to ſave us, that we are permitted to work out our own

Safety

Safety by our own Strength: In our present State therefore we must preserve such a just Moderation of Self-defence as renders it unblamable.

10. In the Self-defence which is unblamable, tho' accompanied with the Death of the Aggressor, three essential Characters must concur, 1. A preceeding just Cause of Offence; for there can never be a proper Repulse where there is not first an offered Violence. 2. A Moderation in the Measure and Manner of the Self-defence. 3. And that it be attempted in the very Conflict. To judge of the first and last is easy, but to discern aright, if the Measure and Manner of the Defence is moderate, we shall need to consider by what ways it may be exceeded: As, 1. By the use of improper Arms, not suited to those by which the Offence is given, as when one defends with Sword and Pistol when he is attacked with a Cane, unless the Disparity of Arms is fully overballanced by the Disparity of Vigour and Outrage of the Aggressor. 2. One may exceed in Point of Time,

by using Arms too rashly before Self-defence required the use of them. And 3. In Point of Measure, when the Self-defence might well have been accomplished by Flight, yet he chused to do it by the Force of Arms.

11. While the Opposition to an Attack truly preserves the Character of *Defence*, although perhaps it exceeded the just Measure, the Death of the Aggressor is never to be punished upon the Defender with the ordinary Punishment; yet he may deserve some Punishment, in as far as he exceeded the just Bounds of Self-defence: But where a Man is not truly upon his Defence, no Provocation, how injurious soever, which does not put his Life in danger, will be a good Plea for Mitigation of the ordinary Punishment of *Homicide*, if the Provoker is killed.

12. It is now generally received, by the Practice of all Nations, that if *Slaughter* does not actually follow the Attempt to kill, the ordinary Punishment of Slaughter does not take place: But if *Slaughter* has followed the Attempt,

Attempt, yet the Slaughter of a different Perſon from him againſt whom the Blow was intended, we muſt diſtinguiſh two Caſes. If the Attempt to kill, as being in Self-defence, was juſtifiable, the Slayer is not chargeable with the unfortunate killing of the Perſon againſt whom the Blow was not intended, becauſe he would not have been puniſhed, had he killed the Man he deſigned to kill: But otherwiſe, if the Attempt to kill was no way juſtifiable, he is chargeable with the killing of the third Perſon, as much as if he had killed the Man he intended. See *Matth. c. 3. n. 12. h. t.*

13. When *Homicide* happens *in rixa*, or on the Occaſion of an accidental Scuffle or Tulzie, wherein ſeveral are wounded, we muſt diſtinguiſh three different Caſes, 1. When it cannot be diſcovered by whoſe hand the *Homicide* was committed, the whole Actors are ſubject to an arbitrary Puniſhment, to be reſpectively proportioned according to the Parts they acted, either in giving Riſe to, or fomenting the Tulzie.

2. Where Wounds are given, and each of them mortal, and where it appears who gave them, they who gave the *mortal Wounds*, without diſtinction who gave the firſt and who the laſt, are equally guilty of the *Homicide*, and ſubject to the ordinary Puniſhment: But if one of the Wounds was *ſlight*, and it does not appear from whoſe hand it came, the whole are ſubject to an *arbitrary Puniſhment*. 3. When it appears from whoſe ſingle hand the mortal Wound proceeded, the ordinary Puniſhment, without the leaſt doubt, takes place againſt him.

14. With reſpect to the *Homicide* that is intended, it makes no difference as to the Puniſhment, whether the Slain does immediately expire, or languiſhes, and dies afterwards of a mortal Wound which he had received. A Wound may be ſaid to be mortal, either ſimply, or neceſſarily, or by a ſupervenient Fever, of which it was the probable Cauſe; or it may prove mortal *ex malo regimine*, and for want of due Care taken of the Cure: And becauſe

becauſe it would be hard to make one ſuffer the Pains of Death in theſe laſt Caſes, and that it is of the greateſt Difficulty to judge aright, whether the Death which enſued was owing to the Wound given, or to ſomewhat extrinſick and adventitious, the general Cuſtom and Practice of Courts has eſtabliſhed a Preſumption in favour of the Giver of the Wound, That if the Patient live forty Days after it, his Death is to be aſcribed rather to ſome other natural Cauſe, than to the Wound. As to the Caſe of him who is killed afterwards by another than him from whom he received a Wound ſimply and neceſſarily mortal; both are ſubject to the Puniſhment of the *Cornelian* Law: But otherwiſe, if not ſimply mortal, the firſt is only obnoxious for having wounded, the laſt for having killed. See *Matth. c.* 3. *n.* 19. *h. t.*

15. Our Law formerly diſtinguiſhed the *Slaughter* which was *premeditated* and committed through *forethought Felony*, from that which was committed of a ſudden called *chaude mella:*

The Punishment of both was capital, with this distinction, That to the Committers of the last was permitted the Privilege of *Girth* or *Sanctuary*, as a safe Refuge: But now that Distinction is obsolete; and, as our Law stands at present, *Homicide* may be divided into that which is intended, comprehending as well the *premeditated Murder* as that which is committed of a *sudden*, for both are punished equally. We call it *intended*, because it is *Murder* according to our Law, if the *Intention* to kill is antecedent to the Act of killing, tho' not premeditated before the Encounter. 2. *Homicide* in Self-defence. And 3. *Casual Homicide*. The two last are exempted from capital Punishment, but may be sometimes punished arbitrarily by Fine and Imprisonment, according to the Circumstances of the Case, *Act* 22. *Parl.* 1. *Sess.* 1. *Charles* II. Under the second may be comprehended the *Homicide* committed upon nocturnal Thieves and Robbers, and in time of masterful Depredation, or in Pursuit of denounced

Rebels

Rebels for capital Crimes, exempted alſo by the ſaid Act from capital Puniſhment. As *Homicide* in Self-defence may be diſtinguiſhed into that which is altogether blameleſs, and that which is not, and wherein the juſt Moderation of Defence is not obſerved, and therefore by the ſaid Act puniſhable arbitrarily; ſo *caſual Homicide* may be likewiſe accounted twofold; that which is abſolutely ſuch, and that which is in part faulty, as being committed while one was unlawfully employed, or as owing to the Omiſſion and Neglect of ſome reaſonable Precaution which might have prevented it, and will therefore comprehend the Civilians *homicidium culpoſum*, likewiſe in ſome meaſure puniſhable by the ſaid Act.

16. As by *intended Homicide* we mean not only that which is *premeditated*, and the Conſequence of Malice preconceived, but alſo that which is *inſtantly conceived* in the very Encounter, ſo as to comprehend all Slaughter where the Intention to kill is antece-

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dent even to the very Blow: It follows, that the *Homicide* which is committed in *Rixa* or *Tulzie* will be construed by us to be *intended Homicide*; for tho' the Tulzie may have been casual, yet may not the Slaughter therein committed; for in all Encounters where mortal Blows are dealt, the Intention to kill is presumed. See *Macken. n.* 12. *h. t.*

17. Before the Reformation our Law and Practice concerning this Crime was much the same as it is at this Day in *England*. In simple Manslaughter they have the Benefit of *Clergy*, and we had the Benefit of *Girth* or *Sanctuary*: But since the Reformation, and more especially since the 1649, all Slaughter seems to have been punished capitally, unless it was *casual* or in *Self-defence*. We find indeed several Cases of Slaughter in the Records, where the ordinary Punishment has been remitted; yet there are none of these but wherein we shall either find some measure of Casualty or Self-defence, or some strong Circumstances

to

to ſhew that there was not even a preſent Purpoſe to kill, and that the Slaughter which happened was truly beyond the Intention of the Agent.

18. Thus all *Homicide* with us is puniſhed capitally, other than that which comes under one or other of the excepted Caſes in the Statute 1661, purpoſely made to remove all Doubts concerning the Puniſhment of this Crime, wherein there is no Indulgence given for Provocation, nor any Allowances made for the *impetus* which the Civil Law ſpeaks of. And herein is our Law juſtified, by its Agreement with the *Moſaick* Law as well as the *Roman*. See *Gen.* ix. 5, 6. *Numb.* xxxv. 16, *&c.* *Deut.* xix. 4, *&c.* and *l.* 1. § 3. *ff. h. t.* Many of the Doctors however think, that Men provoked into a juſt Anger by ſome real Injury or Inſult which the mildeſt and ſweeteſt blooded cannot bear, and killing the Provoker in the Heat of Paſſion, are to be excuſed from the ordinary Puniſhment of the Crime. See *Carpzov. Part.* 1. *Quæſt.* 6. *n.* 16. But as it might be

of

of bad Conſequence to eſtabliſh a Rule, which ſhould make *Provocation* in any Caſe an Excuſe for *Homicide*, we think the Severity of the Law in a ſingular Caſe which pleads Favour, is better to be corrected by the Exerciſe of the Prince's Mercy, than by a general Rule in Law, which might induce Men to reſent the Injuries done them with too great a Liberty; Laws being intended to reſtrain, not to flatter and excuſe our Paſſions.

19. The Exception of *Self-defence*, and the Facts upon which it is founded, muſt be preponed againſt the Relevancy of the Libel, and not remitted to the Jury, as the Matter of *Art* and *Part* may; for the Facts inferring Self-defence are known to the Excipient, but theſe inferring Art and Part cannot always be ſo well known to the Purſuer as to be ſpecially laid in the Indictment; and for that Reaſon only it is indulged by the Law, that the general Alledgeance of Art and Part ſhall be relevant: And the Proof of the Exception of Self-defence, tho' in

in favour of Life, muſt be of equal Strength with that which is needful to ſupport an Indictment or Libel.

20. That Clauſe in the *Act* 22. *Parl.* 1. *Charles* II. touching *Homicide committed in the Purſuit of denounced or declared Rebels for capital Crimes*, has been explained as if it armed every private Man againſt ſuch Offenders with the Sword of Juſtice. But the Word *Purſuit* in the Law ſeems only to be intended of a lawful Purſuit in Virtue of a proper Authority, and therefore only applicable to the Officers of the Law, purſuing ſuch Offenders in Execution of a Warrant.

21. *Murder under Truſt*, formerly puniſhed as *High Treaſon* by the *Act* 51. *Parl.* 11. *James* VI. is now only to be conſidered as a ſimple capital Crime by the Treaſon Act. See 118 *Act*, 12 *Parl. Ja.* VI. 219 *Act*, 14 *Parl. Ja.* VI. and the 96 *Act* of *Ja.* I. as treating of Subject-matters which have a Connection with that of this Title.

22. It is lawful to the Crown to pardon even *premeditated Murder*; but with-

without Letters of Slains first obtained from the private Parties aggrieved, such Pardon is declared null, *Act* 74. *Ja.* II. See also *Act* 63. *Ja.* IV. *Act* 136. *Parl.* 8. *Ja.* VI. and *Act* 157. *Parl.* 12. *Ja.* VI. as relative to this Subject.

Parricide.

THE Crime of *Murder* is aggravated, from the Consideration of the Persons who are killed; and thus *Parricide* is of all Murders accounted the most execrable and detested. In the *Pompeian* Law they are called *Parricides*, who hasten the Fate of Parents or Children, of Husband and Wife, Uncle or Aunt, and all who are in nearer Degrees of Kindred: And by the Appellation of Parents and Children, even natural ones are meant, so far as they can be distinguished with Certainty; for wherever Blood is respected, as in the *Pompeian* Law, natural Children are equally considered as lawful ones; for it offends as remarkably against Nature, to kill what has proceeded

ceeded from us by a forbidden Conjunction, as by a lawful one.

2. Although by the general Strain of the Civil Law, the Endeavour to commit Slaughter was not puniſhed with the ordinary Puniſhment; yet it was otherwiſe with reſpect to this Species of it, becauſe of the nefarious Nature of the Crime. Thus the *Moſaick* Law puniſhed with Death even the ſtriking or curſing of one's Parents, *Exod.* xxi. 15, 17. The Puniſhment of this Crime, according to the more ancient Cuſtoms of *Rome*, confirmed by the *Pompeian* Law, was whipping to Death; and to ſhew how much it was held in Abhorrence, the Body was put in a Sack, with a Dog, a Cock, a Viper and Ape, and thrown into the Sea. See *Matth. c. 2. h. 1.*

3. Concerning this Crime we have a particular Statute, *Act* 220. *Parl.* 14. *Ja.* VI. whereby it is confined to the ſlaying of Father or Mother, Grandfather or Grandmother; for Parents killing their Children are not within the Letter of the Statute, and can hardly

be said to be within the Intention of it, because the Punishment of the Act does not well quadrate with the Case of Parents killing their Children: For the Punishment of this Act, superadded to the ordinary Punishment of Slaughter, is Deprivation of the Benefit of Succession to the Heritage of the Person slain; the Issue of the Parricide is cut off from succeeding to the particular Inheritance of the murdered Parent, but not disabled to succeed to that of their other Kindred; for the Blood is not here attainted, but the Posterity in *linea recta* debar'd from taking any Benefit from a Succession made open to them by their Parents Crime.

4. These only are Parricides within this Act who kill Father or Mother, Grandfather or Grandmother, and other Parents in the direct ascending Line, though not expressed, because in that Line all are as Father and Son: But there seems to be no Reason of doubting with a learned Author, if the Statute can be extended to the killing of Persons in the like Degrees of Affinity,

nity, through which there can be no Right of Succeſſion; for the Puniſhment of the Statute to ſuch, by no Poſſibility can be applied, nor to Baſtards, for the ſame Reaſon. Nor is it a Queſtion of any Importance, if the Iſſue of the *Parricide* is cut off from the Benefit of Succeſſion to the perſonal Eſtate of the ſlain, as well as from that of the real Eſtate; becauſe ſuch perſonal Eſtate will fall under the ſingle Eſcheat of the *Parricide*, and by the Confiſcation of Moveables, conſequent upon the Conviction of a capital Crime, will belong to the Crown.

5. The Puniſhment of this Statute can only take Place in the Caſe of thoſe who are convicted of the Crime by an Aſſize, being preſent and contradicting, or confeſſing: For though the diſinheriting the Iſſue of the Offender may ſeem to be a civil Effect; to make which take Place, the Offender, tho' abſent, might be convicted; yet when we conſider that they are other Perſons than the Offender who are to be the Sufferers, the plain Words of the

Statute are not to be ſtrained beyond their ordinary Meaning.

6. In Perſons above the Age of ſixteen, not only the killing of Father or Mother, but even the curſing or beating them is a capital Crime; but Offenders of this Sort, who are within the Age of ſixteen, but paſt Pupillarity, ſuffer only an arbitrary Puniſhment according to their Deſervings, *Act* 20. *Part.* 1. *Seſſ.* 1. *Char.* II. Since the Statute makes an expreſs Exception of thoſe who are diſtracted, which Judges would of courſe do in the Application thereof, it may probably ſeem to have been the Intention of the Legiſlature, that ſmaller Degrees of Diſtraction than would be needful in ordinary Caſes, ſhould here be ſufficient; and though a total Alienation of Mind did not appear, yet even ſuch Levity and Diſſipation of Underſtanding, as might betray one into the Commiſſion of ſo great an Outrage, ſhould exempt one from the Puniſhment of the Statute. It affords a good Argument, that the Crimes of Perſons under Puberty ſhould in no

Caſe

Case be punished, when we find these even expressly excepted, which offend against the Divine Law, as well as the natural. We apprehend the Statute cannot well be extended to the cursing or beating Grandfather or Grandmother, because Father and Mother are only expressed, and with respect to the more remote Relations the Offence is less criminal.

7. That Species of *Parricide*, which consists in Mothers murdering of their new born Children, is check'd by a particular Statute enlarging the Means of Proof, by authorising a presumptive one, made necessary by the Frequency of the Crime, *Act* 21. *Sess.* 2. *Will.* and *Mary*, which is founded on the Concurrence of these three Facts. 1. Concealment of the Pregnancy during the whole Course of it. 2. Neither calling for, nor making Use of any Help and Assistance in the Birth. And 3. The Child being found dead or missing.

Self-murder.

THE Crime of *Self-murder* cannot properly be punished, because the Offender is out of the Reach of suffering; all that is left to the Law, is to put a Mark of Disgrace on his Memory, by denying him the Honour of decent Burial, and confiscating his personal Estate, as if he had been condemned to Death for a capital Crime: But because such personal Estate would otherwise belong to the nearest of Kin, there must be a Declarator of the Escheat proceeding upon a Proof of the *Self-murder*; and a presumptive one will suffice, because of the Necessity of the Thing, a stronger Proof being in such Cases impracticable; and likewise, because the Effect thereby to be attained, is only a civil one.

2. According to our Practice, these Declarators of Escheat are sustained before the Lords of Session, upon a Proof of the *Self-murder* led before themselves, without any previous Trial before the Justices;

Juſtices; for the Lords Juriſdiction, as to the taking a Proof of the Crime, is here moſt juſtly founded *ratione incidentiæ.*

3. Although *Self-murder* muſt needs be owing to ſome Degree of Madneſs, ſince Nature, not diſordered, carefully ſeeks the Preſervation of Life; yet ought we to diſtinguiſh ſuch Diſorder from a total Aberration of Mind, and the *Self-murders* from thence proceeding, thereby to regulate the Puniſhment to be inflicted on the Memory of thoſe unhappy Perſons: For as Furioſity would ſave one from the ordinary Puniſhment of Murder committed under the Power of it; ſo ought all Marks of Diſhonour to be removed from the Memory of the unfortunate Man, who has haſtned his Death in the Height of a raging Madneſs.

Duels.

HOMICIDE ſometimes receives an Aggravation from the Manner of committing it; as when Perſons go deliberate-

liberately in cold Blood to fight, with an Intention to be the Death of one another; which is the Case of those who fight a *Duel*. We had formerly a kind of judicial *Duel*, which had the Sanction of publick Authority. See *B.* 2. *c.* 16. 47, and following Verses of *Reg. Maj. B.* 3. *c.* 13. *ver.* 4. and *c.* 16. *Laws of Rob.* III. There remained even in the Reign of *Ja.* VI. a Vestige of this, *Act* 12. *Parl.* 16. *Ja.* VI. But these were only known after the Extirpation of the *Roman* Name; for in both Kinds of *Duels*, there was too much Barbarism, to be consistent with the Wisdom and Politeness of their Customs and Manners.

2. Although Death is not the Consequence of such Combats, yet *Duels* are in themselves most unlawful, and the Motives to them have no manner of Title to the fine Names which they assume. The Law has provided Reparation for all Injuries, besides those which are trifling and beneath its Observation; and such therefore as unworthy the Notice of any reasonable Man, ought to be de-

spised

ſpiſed and diſregarded: For Honour can never be wounded by the Imputation of a Thing which the Law conſiders as below its Notice. True Honour and Law can never act in Contradiction to each other, ſince Honour owes its Being to a Conformity with the Law: Neither are Challenges given a ſure Mark of perſonal Courage; for they owe their Exiſtence to Revenge, a Self-gratification ſo high, that it ruſhes its Followers into Dangers, which threaten Life with a Degree of Fury which poſſeſſes none of the Characters of that Firmneſs and Intrepidity which conſtitute true Courage: Far leſs Pretenſions has the accepting a Challenge, rather than ſubmitting to make an Acknowledgment truly due, the ſure Indication of ſtrong Paſſions and a weak Head. True Honour conſiſts in offering a more rational Satisfaction than the *Duel* can poſſibly give; as we ſee in the Practice of ſome of the greateſt Men of Antiquity, who conſidered that the Paſſion of Revenge has an inconceivable Meanneſs in it,

whereas

whereas Forgiveneſs is a noble Act of the Will: That the Fear of the Imputation of Cowardice is ſlaviſh, and proceeds only from want of true Fortitude of Mind; and that the Pride of our Nature unwilling to acknowledge an Error, is the pooreſt and moſt abject Piece of Glory imaginable.

3. Fighting a *Duel*, as diſtinguiſhed from any other Sort of Combat, conſiſts in its being done with certain Formalities which ſhew a deliberate ſet Purpoſe to decide a Quarrel by the Uſe of thoſe Arms which are the common and ordinary Inſtruments of Death. Its eſſential Characters therefore are theſe. 1. A previous Challenge given and accepted directly or tacitely. And 2*dly*, The Parties fighting with mortal Weapons. Coming to the Place of Rendezvous, in conſequence of a Challenge, and refuſing to fight when come, till an Attack is made, is a tacite Acceptance of the Challenge, and has no Claim to the Favour of acting in Self-defence; as in the Caſes of *Mackie*, *Anno* 1670, and of *Robertſon*, *Anno* 1673. By the expreſs

expreſs Words of the *Statute* 12. *Parl.* 16. *Ja.* VI. the very fighting a ſingular Combat, without regard to the Conſequences, whether Slaughter enſues or no, is made a capital Crime. This the Reaſon of making the Act ſpeaks, as well as the plain Letter of it: For was the Crime of fighting a *Duel* only capital, when it was followed with Death, there had been no need of a Statute to make it ſuch; ſo that the Crime does not conſiſt in killing, but in going deliberately to fight, and actually fighting after a Manner whereby killing may probably enſue.

4. Since the Severity of the Puniſhment of this Statute is not ſo much owing to the criminal Nature of the Fact, as the Frequency of committing it, the Seconds, though Art and Part in a proper Senſe, are not ſubject to be puniſhed as ſuch; but when Slaughter happens, we muſt diſtinguiſh between being Art and Part in the Slaughter, and the ſame in the *Duel*: For Seconds in the firſt Caſe are moſt juſtly puniſhable, and in Truth Guilty of a greater Crime,

as being the Spectators in cold Blood of two of their own Species attempting to kill each other, without making a timely Separation; but the ſingle carrying of the Challenge, though Slaughter happened, would not infer Art and Part, further than to juſtify an arbitrary Puniſhment.

5. If Slaughter is the Conſequence of a *Duel*, it makes a great Difference as to the Defender, if the Indictment is founded upon the Acts againſt *Homicide*, or upon this Statute againſt *Duels*: For in the firſt Caſe, the Exception of Self-defence is receivable in Exculpation to elide the Libel; but not in the laſt, as being contrary to an expreſs Quality in the Indictment, which muſt needs be proved, namely, the Challenge, and going to the Combat, in conſequence thereof.

6. The Provoker is conſidered as of the two the moſt criminal; and therefore pointed at particularly as ſuch in the Statute, which ordains that the Manner of his Execution ſhall be more ignominious.

7. The

7. The Puniſhment even of giving or accepting a Challenge, although no Fighting enſue, is *Baniſhment* and *Confiſcation of Moveables*, by the 35 *Act*, 6 *Seſſ.* K. *Will.* And ſince the Statute mentions giving *Challenges* by *Principals*, *Seconds*, or other *interpoſed Perſons*; by giving a Challenge muſt be meant *carrying it*, elſe it could not be applied to Seconds and other interpoſed Perſons, whoſe Part in this Matter cannot ſo properly conſiſt in giving the Challenge, as in carrying it: And the Words *engaging therein*, muſt be conſtrued to extend to thoſe who are anywiſe inſtrumental in giving or accepting the Challenge, in the Caſe that no Fighting enſue; or who have ſome Participation in the Combate, if it does.

Poiſoning.

HE was accounted a Poiſoner, by the Civil Law, who made and diſpenſed *Poiſon*, in the View of its being applied for the Deſtruction of his Species, as well as he who more im-

mediately adminiſtred it to the Perſon thus deſtin'd to be cut off by the Effects of it. The Puniſhment of which was capital, even though it ſhould fail of its Effect, through the more robuſt Conſtitution of the Receiver; becauſe by once giving, the Giver had filled up the meaſure of his Crime. See *Matth. n.* 3. *h. t.* But becauſe ſalutary Medicaments were called *venena*, the *Romans* diſtinguiſhed Poiſon by the Name of *venenum malum*, *l.* 236. *de verb. ſignif.* Yet as ſalutary Drugs given in large Quantities will certainly kill, tho' by ſlow Degrees, as effectually as the rankeſt Poiſon, it is not to be doubted but the Giver of ſuch Drugs with an Intention to kill, is guilty of *Poiſoning*.

2. That Part of the 31 *Act*, *Ja.* II. which abſolutely prohibites the importing of Poiſon, is long ſince in deſuetude; and the after Clauſe which provides, *That the Importer of Poiſon, through which any Chriſtian Man or Woman may take bodily Harm, ſhall tyne and forfeit Life, Lands and Goods,*

now

now that the importing is lawful, is reaſonably conſtrued to extend to all thoſe who give Poiſon with an Intention to kill, whether they were the Importers of the Poiſon or no.

3. Next to the Crime of *Treaſon*, this of *Poiſoning* is by the ſaid Act the moſt ſeverely puniſhed, by a Forfeiture of the real Eſtate, beſides the Pains of Death and Confiſcation of Moveables; juſtly owing to the more nefarious kind of Homicide, rendred deteſtable by the hidden way of conveying Death after a manner againſt which no humane Caution can provide a ſufficient Guard.

4. By the Expreſſion of any *Chriſtian Men* and *Women* in the Statute, all rational Creatures are to be comprehended, which does not ſeem to be intended to exclude *Jews* and *Pagans*, and excommunicated Perſons, as a learned Author would have it; but to be taken, as a charitable way of ſpeaking, of all within the Realm whom the Law preſumes to be Chriſtians: For the Safety provided by the Statute was

ſurely deſigned for the Benefit of Mankind in general.

5. Since it is clear in the Civil Law, that the Crime is committed by the giving of *Poiſon*, though it happens to fail of its Effect, the ſame Caſe may well be brought within our Statute, ſince the Expreſſion will carry it: For the Act ſays, *through which they may take bodily Harm*; which points at the Probability and Likelihood of *Harm* enſuing, though it does not actually enſue. *Carpzovius* here differs without Reaſon, *Part.* 1. *Quæſt.* 21. *n.* 33. for though in Crimes, the Maxim, that the Intention without its Effect is never puniſhed, will generally hold, yet not in this Caſe, becauſe the bad Intention here is diſcovered with as great Certainty by the ſimple giving the Poiſon, as it is in other Crimes by the full Completion of the Crime.

6. Even Medicines which given by a skilful and ſparing hand, are ſalutary, being given liberally, and with an Intention to kill, will come within the Meaning of this Statute, though not within

within the Letter of it, especially if Death follows, or the *Indicia* of the Intention to kill are strong and irresistible; as in the Case of *Kennedy*, *Anno* 1676.

Theft.

THEFT is a Crime, not only because the Order of Society is thereby violated, in taking from us without our Consent what is made ours conformably to its Laws; but also because it is an Invasion of that Right which, antecedent to any Contract among Men, subsisted in a State of Nature upon the Foundation of prime Occupancy, which without the Supposition of any tacite Compact, does of itself create a Right in virtue of the Relation between the Person and the Thing, which consists in the first Seizure of it, and which is always something more than any other can claim, and therefore exclusive of the Pretensions of all others to use it. But without carrying this Right so high, *Theft*

may be reckoned an Offence againſt the natural Law, in as much as the Property of Goods, ſuch as is at this Day eſtabliſhed, is of natural Law: For though it was introduced by the Will of Man, yet the Moment it was ſo introduced, it became a Rule even of the Law of Nature. *Grotius, lib.* 1. *cap.* 1. § 10. *n.* 4.

2. The *Romans* defined *Theft* a fraudulent intermeddling with the Goods of others, for the ſake of making a Gain of them, and that either with the Goods themſelves, or with the Uſe and Poſſeſſion of them, contrary to the natural Law: So that not only the undue intermeddling with the Thing of another, and taking it out of his poſſeſſion, but even the applying it fraudulently, and in the view of Gain to any other Uſe than the deſtin'd one, when it is lawfully in our own Poſſeſſion, is *Theft*; but in the intermedling with the part of a whole, one is only liable for the part, *l.* 21. *ff. h. t.*

3. It is an eſſential Character of this intermeddling, which conſtitutes *Theft*,

to

to be fraudulent, or that it be done with a bad Intention, and contrary to the Will of the Owner of the Thing, which muſt both concur to make it fraudulent; and it muſt be done likewiſe in the View of making a Gain: for Goods taken and wantonly abuſed, to affront and give Diſpleaſure to the Owner, makes not *Theft*. It is a Queſtion if it is *Theft*, when one takes the Goods of others without their Conſent, merely to ſatisfy their Indigence, and to preſerve Life? It would ſeem not. Actions of themſelves ſtript of their Motives, are neither good nor bad with reſpect to the Agent, in whom it is the Motive alone which characteriſes the Action. *Grotius* ſolves the Queſtion upon the Foundation of an Hypotheſis, which eſtabliſhes a direct and perfect Right ariſing from Neceſſity, which reduces Things to their primitive State, and lays them in common. *Book* 2. *Chap.* 2. § 6. *n.* 2. *Puffendorf* thinks it will be better determined upon the foot of an *imperfect Obligation*

ligation arising from Humanity, *Book 2. Chap. 6. n. 5, 6 and 7.*

4. In the Civil Law, *Theft* was either said to be manifest, when the Thief was either caught in the very Act of Stealing, or was seen with the stoln Goods before he had carried them to the designed Place; or not manifest, when he was neither so caught nor seen: Of which kind the Aiders and Assisters in Theft were deemed guilty. The first was punished with beating or whipping, if the Offenders were free Men, or if Slaves, they were thrown headlong from a Precipice after being whipped. The last was punished by Payment of the Double of what had been stoln; and at last even the *manifest Theft* came to be punished by Payment of the Quadruple. But betwen Husbands and Wives, and between Children and Parents, the Action of *Theft* ceased, for the Honour of Matrimony in the first Case, and the paternal Reverence in the last. *Matth. c. 1. n. 12. h. t.*

5. It

5. It is a Question much disputed, if *simple Theft*, not aggravated with any particular Character which renders it atrocious, ought to be punished capitally? It makes for the Negative, that by the *Mosaick* Law the Punishment of *simple Theft* was only pecunial, *Exod.* xxii. 1, &c. whereas *sacrilegious Thefts* were punished capitally; and that the Rules of distributive Justice will not permit the inflicting a capital Punishment for so small a Crime as a simple Theft of Mens Goods, as being in no sort adequate and proportioned to the Nature of the Offence. *Marb. c.* 2. *n.* 6. *b.* 1. It would be an Imputation to punish with less Severity than the *Mosaick* did those Crimes which are in their Nature atrocious, and made subject to the Punishment of Laws intended to be perpetually binding on future Ages. But as to those Crimes which by the *Jewish* Law were chastised with the milder Punishments, there is no Reason why they may not be made higher in different Nations, where such Crimes rage with greater Fury and Licentious-

centiousneſs, and which therefore juſtly demand a ſeverer Puniſhment to repreſs them. The particular Exigencies of every State juſtify higher Degrees of Puniſhment, than what the Nature of the Crime, conſidered abſtractedly, may ſeem to demand. According to the general Practice of Nations, a Diſtinction takes place between ſimple Theft, and that which is aggravated and rendred atrocious by certain Circumſtances accompanying the Fact. The firſt is never puniſhed capitally, the laſt is. See *Math.* c. 3. *h. t.*

6. *Theft* receives an Aggravation from the Perſons committing it, if they are in a Situation which places them in any Degree of Truſt and Familiarity, which affords them Opportunities favourable for the Commiſſion of the Crime. 2. From the Nature of the Thing ſtoln, if it is deſtined to ſacred Uſes, as arguing a greater Degree of Proſtitution than the ſtealing of Things which are in common and ordinary Uſe; or if it is a Thing belonging to the Publick; or if it is a Thing of

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conſiderable Value. 3. From the Place where the Theft is committed, as if it is done in the Palace of the Prince, or in the publick Market-place. 4. From the Time when it is committed, as if it is done in the Silence of the Night, when People are moſt unguarded. 5. From the manner of committing it, as if it is done in a ſturdy and violent way, by breaking through all Fences, and knocking down all Perſons who ſtand in Oppoſition. *Matthæus* in the Puniſhment of this Crime ſeems too gentle, *c. 3. h. t. Carpzovius* too ſevere, *Part 2. Quæſt. 77.* A *Medium* between them would be a good Rule to follow.

7. The Aggravation which calls moſt loudly for Severity of Puniſhment, is that which conſiſts in a frequent Commiſſion, when the vitious Habit of *Stealing* is become familiar, and is grafted as it were in the Conſtitution: Hence the third Theft is generally puniſhed with the Pains of Death. But in numbring the Thefts, as many Things as are ſtoln, do not

make

make as many Thefts; nor even do many Times employed to carry off a great Parcel of one Thing, which could not be carried off at once, if the Times are immediately ſucceſſive, make more than one Theft. The Thefts therefore are to be numbred according to the Number of Convictions, not that of the Puniſhments inflicted: Nor would the Prince's Pardon of two former Thefts, as extinguiſhing the Crimes, hinder a new Theft committed from being eſteemed a third one.

8. The Definition of *Theft* in the Civil Law is perfectly ſuited to our Notion of the Crime; for we would chuſe to call it an *intermeddling with*, rather than *carrying off* a moveable Subject, to comprehend the Theft that is made of thoſe Things whereof we have the lawful Poſſeſſion, but ſteal the Uſe in ſuch a manner as renders the Thing unfit for its Maſter's Service. And we muſt needs call it *fraudulent*, and likewiſe explain the Term as they do, to mean an intermeddling not only without the Maſter's Privity, but

contra-

contrary to his Will, whether expreſs or preſumed; for it may be without his Privity, and yet agreeable to him.

9. The ſimple *Miſuſe* of a Thing we would not account a *Theft*, unleſs it was ſuch as rendred the Thing unfit for its proper Uſes; for being thus deteriorated, it is no longer the ſame thing it was, and was likewiſe done in the View of making a Gain. What is ſaid in the 3 *Book*, 9. *chap.* 5 *ver. Reg. Maj.* That he who abuſes a Thing lent to him, is excuſed from Theft thereof, becauſe the beginning of his Intromiſſion therewith was with the Owner's Conſent, is plainly the Law of *England*, not ours. See *Coke*, 3 *Inſtit. p.* 107. For we hold, that the fraudulent embezling Things, though originally received from the Hands of the Owner, if the Property thereof was not intended to be conveyed, is *Theft*, as well as the fraudulent ſeizing and taking of Goods immediately from out of the Poſſeſſion of the Proprietor. See *Macken. n.* 2. *h. t.*

10. But we differ much from the Civil Law, which did not account an *intermeddling* fraudulent, where there was not a proper Master of the Thing, in the Construction of Law, who might be said to be defrauded, *l.* 43. § 5. *ff. h. t.* as in the Case of intermeddling with the *res hereditariæ* before the Entry of the Heir, *l.* 68. *ff. h. t.* and *Matth. c.* 1. *n.* 6. *h. t.* For to say, that the proper apparent Heirs of such Things are not yet Masters enough of them to make the Embezlement of them *Theft*, is a mere Subtilty.

11. The Question so much disputed, namely, If an indigent Person may without the Imputation of *Theft* take what is indispensably necessary for the present Relief of his Necessities, is well determined by the Humanity of an old Law in the *Regiam Majestatem*, called the *Law of Burdensack*, by which it was provided, *That for Theft of a Calf or Sheep, or as much Meat as a Man might carry on his Back, no Court should be holden*; that is, no Accusation of

of *Theft* should lye, *Reg. Maj. Book* 4. *chap.* 16. *ver.* 1. agreeably to the Reason in the 39 *l. ff. h. t.* namely, That the Fact or Act of *Stealing* is not so much to be considered, as the Cause and Motive, than which none can be more powerful, as arising from the Cravings of Hunger, and the Want of the Necessaries of Life.

12. Our Distinction of *infang* and *outfang Thief*, as we explain these Terms, participates of the essential Characters of that of the *fur manifestus* and *nec manifestus* in the *Roman* Law; but the Use we make of it is very different, for with us it serves to govern the Matter of *Competency*, and to shew where the Crime ought to be tried; whereas the *Romans* made use of it to regulate the Punishment of the Crime. In *England*, from whence we derived these Terms, they bear another Meaning, probably owing to our Mistake of the Word *Fang*, which in the original Language signified *to catch*. See the *English Law Dictionaries*, or *Wood's Inst.* and *quon. attach. cap.* 100.

13. The chief Diviſion of Theft in our Law is to be gathered from the 50 *Act*, 11 *Parl. Ja.* VI. which mentions three kinds of it, *viz. Common Theft*, *Reſet of Theft*, and *Stouthrief*. The firſt is that which we have been conſidering, of which it is the peculiar Character to be committed in the moſt concealed manner, which may leaſt diſcover the Committer. The ſecond conſiſts in the receiving the ſtoln Goods, knowing them to be ſuch, into Cuſtody and Protection. The laſt is Robbery in a proper Senſe, commonly called in our Statutes *maſterful Theft*. Of *common Theft* we alſo diſtinguiſh two kinds, that which is of Things of Value, and that whereof the Things are of ſmall and mean Price, commonly ſignified by the Name of *Pickery*, or *petty Theft*. See the 121 *Chap.* of the *Burrough Laws*, wherein 'tis to be noticed that *Thirty two Pennies* is not accounted ſo trifling a Sum as one would be now apt to imagine.

14. According to our Law, the Puniſhment of that Theft, which did not

fall

fall under the Name of *Pickery*, was capital, as appears from many Texts and Paſſages in Statutes, partly enacting the Pains of Death to be the ordinary Puniſhment of the Crime, partly taking it for granted that ſuch was the Puniſhment, which is at leaſt a good Proof of *conſuetudinary Law*. See *Burrough Law*, *chap.* 121. *ver.* 5 and 6. *Reg. Maj. Book* 4. *chap.* 16. Laws of *Dav.* II. *chap.* 17. and *Act* 5. *Parl.* 18. *Ja.* VI. But that Severity becoming leſs needful, by the leſs frequent Commiſſion of the Crime, therefore in later Practice it is never ſo puniſhed, unleſs rendred atrocious by ſome Circumſtances of Aggravation, of which *three repeated Thefts* is the chief. As to which, we not only follow the Practice of other Nations; but ſuch Practice is juſtified by a particular Statute of our own, the 121 *chap. Burr. Laws*. Beſides this one Circumſtance in the Offender, namely, his being a *Landed Man*, formerly made the Puniſhment of this Crime to be that of *High Treaſon*, but now is returned to the *Pains*

of Death and *Escheat of Moveables* only. See the 50 *Act*, 11 *Parl. Ja.* VI. joined with the Treason Act 7 *Anne*, *chap.* 21. Not only is he a Landed Man who is infeft and in Possession of Lands, within the Meaning of these Statutes; but he also who possesses Lands in Right of Apparency, or in Virtue of a Disposition not yet compleated by Infeftment.

15. These Circumstances of Aggravation, arising from the Nature of the Thing stoln, which we have already touched, may well induce our Judges to make the arbitrary Punishment of *Theft* more severe than they would otherwise do, but would not carry the Punishment higher. Next to the Aggravation which consists in a *third Theft*, is that of committing it in the Night-time, if accompanied with any Violence done to the Persons in the House, or even to the House itself, and as participating of *Reif* merits a capital Punishment. *Arg.* 22 *Act*, 1 *Sess.* 1 *Parl. Charl.* II.

16. Of the same Nature is *Hairship*,

or *driving of Cattle*, known in the *Roman* Law by the Name of *Abigeatus*, which though done in the Night-time and by Stealth, yet partakes of the Nature of *Stouthreif*, and is therefore punished capitally. What Number of Cattle or Sheep will make a *Hairship*, is not defined in our Law, and nothing in Practice has occurred whereupon to settle a Rule for it; for those who drive that Trade never carry off so few as to give Rise to the Question. In the Civil Law he was accounted an *Abigeus* who carried off one Horse or one Ox, or four Swine or ten Sheep; if he took a smaller Number of Swine or Sheep, he was reckoned a *Fur* rather than an *Abigeus*.

17. Besides the Distinctions of *Theft* already mentioned, we have another general one, between proper Thefts and statutory. The last are certain Offences which will not fall under the Definition of *Theft*, which however have been so called, because they were declared to be punishable as Theft; such is the slaying or houghing of Oxen and

and Horse, cutting and destroying the Geir belonging to the Plough, growing Trees and Corns, breaking of Mills, sticking and goring Oxen in Time of leading Corns or Fewel, 82 *Act*, 11 *Parl. Ja.* VI. thereby made punishable with the Pains of Death. Such also is the breaking of Dove-coats, Coney-gairs, Parks, Stanks, and stealing forth of the same Does, Raes, Conies, Doves, Pikes, Fish, Hives and Bees, without special Licence of the Owner, 13 *Act*, *Ja.* V. The Punishment of which is now pecunial, 69 *Act*, *Ja.* IV. and 84 *Act*, 6 *Parl. Ja.* VI. whereby the Peelers and Destroyers of green Wood, Cutters of hained Broom, Breakers of Yards and Orchyards, are ordained to be punished in like manner.

18. *Reset of Theft* is punishable as Thefts, by the 21 *Stat. Alex.* II. which consists in receiving stoln Goods into Custody after such a manner as indicates a Participation of the Crime, *i. e.* knowing them to be such, and concealing them for the Use of the Thief.

But

But different from this Crime is that of *resetting* and *maintaining* the Persons of Thieves, made a capital Crime by the 21 *Act*, 1 *Parl. Ja.* VI. and known in the *Roman* Law by the Name of *Receptatio*, which consisted in concealing with a bad Intention, *dolo malo*, not only Thieves and Robbers, but other Offenders when they might have apprehended them, and afterwards in Consideration of some Money, or part of the stoln Goods, dismissing them. The Punishment of which was the same with that of the protected Offender; but was mitigated in the Case of Innkeepers, and the Kinsfolks of the Offender, for special Reasons, as well as for want of that essential Character, the taking a Reward for dismissing them.

19. *Reset of Theft* is twofold, that which is immediate, when the Resetter is privy to the Theft committed, and forthwith takes the stoln Goods into his keeping; and that which is mediate, when without any Participation of the Theft, one interposes afterwards

wards, and gives his Service towards the disposing of the stoln Goods, which he knows to be such, in Markets or otherwise, with more Ease and Safety than could by the Thief himself be well accomplished. The Punishment of the first is founded on the Statute of *Alexander*, and confirmed by subsequent Practice to be the same with that of the principal Thief. The Punishment of the last is Banishment and Confiscation of Moveables, *Act* 109. *Parl.* 11. *Ja.* VI. The Words of the Statute extend to all Sellers of the Goods of Thieves and disobedient Persons; that is, Thieves at the Horn, as well as those in particular who sell such Goods of Clans who dare not come to Lowland Markets. When it is said that the Punishment of the immediate *Resetter* and that of the Thief shall be the same, we must always understand it *exteris paribus*; for with respect to the Thief, it may be the third Theft, but the first Fault in the *Resetter*, and the Thief may happen to be a landed Man, but not the *Resetter*.

20. As the Thief is the principal Offender, the Reſetter cannot be tried, till the Thief is firſt convicted; and if he is aſſoilzied, the Reſetter enjoys the Benefit of his Acquittance. See the Laws of *David* II. *c.* 29. *quon. attach. c.* 83. and *Macken. n.* 4. *h. t.* But this Rule holds only where the principal Offender is alive and may be convicted, or has not fled from Juſtice; for we cannot imagine the Rule ſo inflexible, as in either of theſe Caſes to give the Reſetter Impunity. In all Caſes of Reſetting, the Wife of a Thief is to be mildly dealt with, where her Participation of the Theft does not evidently appear, *propter reverentiam maritalem.* See *Macken. n.* 5. *h. t.*

21. The Crime of *Theftboot* is committed, when one compounds with a Thief to ſave him from the Puniſhment of the Law. *Bote* in the original *Saxon*, ſignifies compenſation; ſo that *Theftboot* is as it were the Compenſation or Ranſom of Theft prohibited by *c.* 77. *quon. attach.* and *c.* 3. Laws of *Rob.* I. where it is extended to all capital

pital Crimes. In *Act* 137. *Ja.* I. *Theft-boot* is the ſelling a Thief, that is, taking a Price for his Impunity; and it is there alſo called *Fineing* with a Thief, which is the ſame Thing; for *fineing* ſignifies compounding, or making an End of a Matter, and finally agreeing it, *finem facere.* Thus in the Laws of *William* it is ſaid, *Finem facere cum molendinario, c.* 9. *v.* 8. As this Crime was more likely to be committed by Judges, than others who had leſs Occaſion to tranſgreſs: Thence it is, that Juſtices, Sheriffs, Lords of Regality and Barons, are mentioned in the Act of *Ja.* I. but with this Difference, that the firſt, as being publick Perſons, in whom greater Truſt is repoſed, are to be puniſhed with Death and Confiſcation of Moveables; whereas the laſt, as private Men, veſted only with a patrimonial Juriſdiction in their own Eſtates, ſuffer only a Loſs of the Juriſdiction which they have thus abuſed: But in all others, this Crime is puniſhed as Theft, by *Act* 2. *Ja.* V. which ſurely extends

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to Barons and Lords of Regality; for the ſimple Loſs of their Juriſdiction is too ſmall a Puniſhment for them, if all others are to be puniſhed as Thieves; and a particular, but milder Puniſhment being by a former Law ordained to be inflicted on them for this Crime, can never be a Reaſon for exempting them from the ſeverer Puniſhment of a poſterior Law, ordained to be inflicted on all Perſons without Diſtinction for the ſame Crime. *Mackenzie* is of Opinion, that the Words of *Act* 137. *Ja.* I. are miſplaced, and that the Law intended that Lords of Regality and Barons ſhould be puniſhed with Loſs of Life and Office, as well as Juſtices and Sheriffs. See his *Obſervations* on the Act.

22. In one Inſtance our Law preſumes Theft from a vagrant Manner of Life, Want of a fixed Reſidence and an honeſt Occupation, or ſome viſible Way of getting a Livelihood. We commonly call theſe Offenders *Sturdy Beggars*; the Law diſtinguiſhes them by the Name of *Egyptians* and *Sorners*,

and inflicts on them a capital Punishment. It appears from the Number of Laws made in former Times to restrain and punish those Vagrants, that they had much infested the Country, *Acts* 25 and 42. *Ja.* I. *Act* 70. *Ja.* IV. *Act* 22. *Ja.* V. *Act* 74. *Parl.* 6. and *Act* 97. *Parl.* 11. *Ja.* VI. At last they were banished forth of the Kingdom for ever, never to return under the Pain of Death, *Act* 13. *Parl.* 20. *Ja.* VI. In the Trial of these Offenders the Court proceeds upon this single Fact, namely, the being *called, known, habite and repute Egyptians*, according to the particular Direction of the Statute: Against which, the specious Colour of an Occupation, such as strolling Tinkers usually pretend to, will prove a weak Defence, though our Practice permits those who are indicted upon this Statute to adduce Witnesses to their Character, that the Assize by hearing what is proved in their Behalf, may be the better enabled to judge of the Strength of the Evidence upon the main Point of *habite and repute Egyptians*.

Rob-

Robbery.

ROBBERY is in Effect a violent Theft: Thus the only Character of Diſtinction between theſe Crimes is, that the one is committed after the moſt hidden and concealed Manner which may leaſt diſcover the Committer; the other is done in the moſt daring and audacious Manner, and as it were in Defiance of the Law; for both tend to the ſame End, to rob us of our Goods. Againſt the firſt, greater Care and Circumſpection may prove a ſufficient Guard; but againſt the laſt there is no Fence but the Law, which therefore inflicts the laſt Puniſhment, becauſe the only Security to be found is in the Death of the Offender. The *Julian* Law diſtinguiſhed Violence of two Kinds, one publick, another private. The firſt was committed by the Uſe of Arms, the laſt without them. Under the firſt, according to our Law, we may properly claſs the Crime of

Robbery; under the laſt, that of *Oppreſſion.*

2. This Crime is ſometimes called *Reif* in our Statutes, ſometimes *Stouth-reif*; the Puniſhment of which is declared to be capital by *Act* 53. *Ja.* II. And how much Need there was in former Times to guard us againſt the Commiſſion of this Crime, may be gathered from the Law which puniſhes as Art and Part the Aiders and Abettors of *Robbers*, by giving them Meat, Harbour and Aſſiſtance, *Act* 21. *Parl.* 1. *Ja.* VI. And from that which armed all Freeholders againſt ſuch Offenders who had not given Security for their good Behaviour, by making them Juſtices for the Effect of apprehending their Perſons and Goods, keeping them in Priſon, or executing them to Death, *Act* 227. *Parl.* 14. *Ja.* VI.

3. In the Law of *England* there are ſeveral eſſential Characters to conſtitute this Crime; namely, a violent Aſſault, a taking ſomewhat from a Perſon and putting him in Fear: Whereas our Statutes place the only Character of Diſtin-

Diſtinction between it and Theft, in the open, violent and maſterful Manner in which it is committed; whether the Things *robbed* are taken from a Perſon or not, if they are but violently ſeized on and taken out of his Poſſeſſion: Yet we cannot but approve of theſe Requiſites in the Law of *England*, as proper Characteriſticks of the Crime, eſpecially that which requires the Preſence of a Perſon from whom the Things may be ſaid to be *robbed*.

4. As in the wrongful taking of Things, there is often a great Difference in the Meaſure of the Violence committed, ſo in theſe Caſes the Diſtinction of the *Roman* Law, between the *vis publica* and *privata*, may on many Occaſions which occur in our Practice be fitly applied; and thereby in particular may we diſtinguiſh between *Robbery* and *Spulzie*, in which, a Right of Property is commonly pretended to juſtify the leſſer Violence with which it is committed: And although the taking one's own Thing in the moſt violent Manner, may not ſeem in a proper

Senſe to be *Robbery*, yet when we conſider that there is a rightful Poſſeſſor, as well as a rightful Owner; and that the Poſſeſſion therefore is a Matter of Right, as well as the Property, equally entitled to the Protection of the Law; it would be hard to find a good Reaſon upon theſe Principles, for not eſteeming the Action of recovering the loſt Poſſeſſion of Things, *Robbery*, if it is performed with the ſame Violence wherewith Men commonly commmit plain *Robberies*. And if that is the Caſe, there will appear to be no need of any previous Judgment to determine the Right of Property, according to a Clauſe in *Act* 34. *Ja.* V.

5. As there is a ſmaller Degree of Violence to be found in many Acts of Oppreſſion, we may well conſider the Puniſhment of thoſe Acts of Oppreſſion which have fallen under the Notice of the Law, as the Chaſtiſement of that *vis privata* contained in them which conſtitutes their criminal Character. Thence it is, that although Oppreſſion in general is but a Quality of Crimes, yet

yet it is in our Practice considered as a specifick Crime, and often made the Foundation of criminal Libels *per se*. Manifold are the Acts of Oppression which have not fallen under the Observation of the Law; but the chief of those which have, are to be gathered from these following Statutes, *Act* 42. *Ja.* IV. *Act* 43. *Ja.* IV. *Act* 111. *Ja.* V. inforced by *Act* 4. *Parl.* 19. *Ja.* VI. *Act* 46. *Ja.* IV. *Act* 21. *Q. Mary*, and *Act* 84. *Parl.* 11. *Ja.* VI. One particular Act of Oppression is distinguished by the Name of *Concussion*, which signifies that Offence by which any thing is as it were forcibly extorted by those who employ their Power and Authority as the Means of forcing a Compliance; the natural Punishment of which, is at least to reduce Things to that State wherein they would have been if the Offence had not been committed. See *Macken. n.* 7. *h. t.* Of this Kind of Oppression, is the exacting Payment of Money or any other Sort of Reward for affording Protection against *Theft* and *Stouth-reif*; by which private

Persons

Persons were laid under Contributions to Thieves and Robbers, and thus obliged to purchase the Safety of their Goods from their Plunder. This Species of Oppression is called in our Law the taking of *Blackmail*; and the Punishment thereof is capital. See *Act* 21. *Parl.* 1. and *Act* 103. *Parl.* 11. *Ja.* VI.

6. *Robbery* committed at Sea, is distinguished by the Name of *Piracy*; which all Nations, in any Measure civilized, punish with Death. We have no Statute before the Union touching this Crime; the Nature of it being easily understood, we followed the general Practice of other Nations: But now by an Act 6 *Geo.* I. *c.* 18. for making perpetual an Act 12. *Gul.* III. for the more effectual Suppression of *Piracy*, these following *Species facti* are either declared to be *Piracy*, or the Offenders made subject to be punished as *Pirates*, *viz.* 1. A natural born Subject committing *Piracy*, or any Act of Hostility against his Majesty's Subjects at Sea, acting under Colour of any Commissi-

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on or Authority from any foreign Prince or State whatever. 2. Every Commander or Master of a Ship, or Seaman or Mariner turning *Pirate*, or giving up his Ship to *Pirates*, or combining to yield up, or running away with any Ship, or laying violent Hands on his Commander, or endeavouring to make a Revolt in the Ship. 3. Setting forth any *Pirate*, or aiding and assisting such as commit *Piracy*, concealing such *Pirate*, knowing him to be such, or receiving any Vessel or Goods *Piratically* taken. This Crime may be tried either before the Court of Justiciary, or High-Court of Admiralty; and the Judgments thereupon are ordinarily executed within Flood-mark.

Falshood.

NOTHING can follow the Crimes of Theft and Robbery in a more natural Order than that of *Falshood*; for as Men are often stript of their Goods by the more hidden Arts of Theft, or the more avowed and open Attempts

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of Robbery, ſo they are frequently deprived of their juſt Rights by the Effects of *Falſhood*, which is well defined, *A fraudulent Imitation or Suppreſſion of Truth done to the Hurt and Prejudice of others.* In the Conſtruction of this Definition we find three eſſential Ingredients of the Crime. 1. A malevolent Purpoſe: Nor will preſumptive Dole be here ſufficient, for an apparent Fraud may ſo often ariſe from Miſtake, that an Error in Judgment is preſumed rather than an Error of the Will; thus Men innocently ſometimes affirm a Lie which they are made to believe. 2. A perverting of the Truth by ſome palpable Variation, by an actual cancelling and ſuppreſſing what is Truth, or ſubſtituting what is falſe in Place of it, ſo as to make a real Mutation, *l.* 23. *ff. ad leg. Cornel. de falſis.* 3. Damage either done to another, or which will probably be the Conſequence of the *Falſhood*, with this Difference as to the Puniſhment of the Crime, that in the laſt Caſe it will be mitigated. Which three eſſential Requiſites muſt concur

in the same Fact to constitute the Crime of *Falshood*, *Carpzov. P.* 2. *Quæst.* 93. *n.* 6, 8, 10.

2. The great Diversity of criminal Facts from which this Crime may be inferred forbid the Enumeration of all the Species's of *Falshood*; but to bring our View within some Compass, we may reduce them under four general Heads. The *first* comprehends those which are committed by a *Falsification of the Person*, when one personates another, or by false Appearances puts upon us one Man for another: Thus suppositious Children may be imposed; a noted Instance of this Kind of *Falshood* we find in *Clarus*, *l.* 3. *Sent. Quæst.* 59. The *second* comprehends *verbal Falshoods*; when Words are uttered with an Intention to deceive, and when in Reality and Effect they become the Cause of great Damage; as in giving false Evidence. The *third* comprehends those which are committed by the *Falsification* of *Writings* and *Seals* whether publick or private. And the last comprehends the *Falshoods* com-

committed by the Abuſe of *Weights* and *Meaſures*, when falſe ones are ſubſtituted in Place of thoſe of the true Standard. In ſo great a Diverſity of criminal Facts as this Crime may happen to conſiſt of, the Puniſhment of it cannot be but arbitrary with reſpect to many of them, for ſome of them are atrocious enough to deſerve the laſt Puniſhment, *l.* 22. *Cod. ad leg. Cornel. de falſis. Carpzov. P.* 2. *Quæſt.* 93. *n.* 17, 18, 19, 20.

3. According to our Law, *Falſhood* may be diſtinguiſhed into that which is committed, 1. By *Writing*. 2. By *Witneſſes*. And 3. By the *Uſe* of *falſe Weights* and *Meaſures*. The *firſt*, which conſiſts in the fabricating a falſe Writing, and which we diſtinguiſh by the Name of *Forgery*, affects not only the *Maker*, but the *Uſer*: But as the *Uſer* in many Caſes may happen to be innocent, our Practice admits of a juſt Precaution; namely, that he only incurs the Guilt of this Crime, when he ſolemnly declares that he abides by the Writing in Queſtion. And becauſe the Perſon to whom

whom ſuch Writing belongs, being an Heir or ſingular Succeſſor, may not be appriſed of the Vice under which it labours, and that it may be hazardous to abide ſimply by it, our Practice gives a further Indulgence, and permits him to abide by it in a qualified Manner, though not as a Deed abſolutely true, yet as truly made over to him, and to the Forgery of which he had no Acceſſion. Of which Subject-matter the Doctrine is compriſed in theſe Rules. 1. The Uſer of a falſe Writing, knowing it to be ſuch, is as obnoxious to the Law as the Fabricator. 2. The Uſer of a Writing to which he is a Party muſt abide ſimply by it. 3. The Uſer being an Heir or ſingular Succeſſor, is permitted to abide by it under proper Qualifications, eſpecially if there is a Perſon extant who abides ſimply by it.

4. Our antient Laws againſt this Crime mentioned only the *forging of Charters*, and made the Puniſhment of counterfeiting the King's Charters different from that of falſifying thoſe of private Men; namely, the *Pains of*

Treaſon in the firſt Caſe, and *Demembration* in the laſt. See *c.* 19. *Stat Alexander* II. and *B.* 4. *c.* 13. *Reg. Maj.* Later Statutes extended the Crime to the *Forgery of all Writings whatſoever*; but ſeemed to confine the Puniſhment to Notaries, *Act* 80. *Ja.* V. and *Act* 22. *Q. Mary.* But all Dubiety touching this Matter was removed by *Act* 22. *Parl.* 23. *Ja.* VI. which enacts, *That whoſoever makes and uſes a falſe Writing, or is acceſſory to the making thereof, ſhall be ſubject to the Pains of Falſhood.*

5. The ſimple fabricating a falſe Writing, or being acceſſory thereto, does not infer Forgery, if the Writing is not alſo uſed; but either being Principal or acceſſory and uſing conſtitutes the Crime; and the Reaſon is twofold, 1. Where there is no Uſing, one of the eſſential Ingredients of *Falſhood* is wanting, namely, the doing Hurt and Prejudice to another, which can never happen through the ſimple Forgery of a Writing, if it is not applied to Uſe. And 2. The Uſing is an explicite and palpable Demonſtration of a criminal Purpoſe:

Purpoſe: But if it is once put to Uſe, whether in Judgment or out of Judgment, it may not afterwards be paſſed from; becauſe though no Hurt is yet done to any Perſon, yet Prejudice might have been ſuſtained, and that is ſufficient to conſtitute the Crime. The Statute, ſpeaking of the Acceſſion to this Crime, does not repete the Word *Uſing*, as in the firſt Part of the Clauſe relating to the principal Offender; becauſe he who is acceſſory to the making of ſuch a Writing which is uſed, is preſumed to be privy to the Uſing. It would be *Uſing* within the Statute, 1. To bring an Action upon the falſe Writing, and produce it in Judgment as the Title to purſue. 2. Simply to commence an Action thereon, by raiſing and executing a Summons reciting the falſe Writing as the Title, without producing it in Judgment. 3. Aſſigning over the Writing to another, whether for a valuable Conſideration or not. 4. The ſimple Delivery of it to another to the End it may be uſed, if ſuch is the Nature of the Writing, that

it may be put to Uſe without being formally aſſigned; and in general, by any other Way from which the Intention of the Forger that the Writing ſhould paſs into Uſe, may be gathered with Certainty.

6. The Trial of this particular Species of *Falſhood* which we call *Forgery*, was at firſt made competent to the Court of Seſſion *ratione incidentiæ*; and now long Cuſtom has brought all thoſe Trials into that Court, becauſe the neceſſary Forms of Proceeding proper to the Trial of that Crime, are not ſo conſiſtent with the peremptory Diets of the Court of Juſticiary; inſomuch, that Trials of Forgery before the Juſtices *in prima inſtantia* happen but ſeldom. The Method of proceeding in theſe Trials before the Seſſion, is either ſummary upon a Bill, or ſolemn by a Summons of Improbation. In thoſe Caſes where the publick Seals, or any Part of a Proceſs is falſified; or where the Proſecutors have the forged Writing in Poſſeſſion, the firſt Method is followed, a Warrant is iſſued for the

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Commitment of the Offender, and the Lords proceed ſummarly to examine him, and to take the Proofs. But where the Purſuers have not the Writing in Queſtion, they muſt proceed by a Summons of Improbation, to force the Production of it in the ordinary Way.

7. Although Certification has gone out againſt a Writing, which prevents its being hurtful for the future; yet where there are many concurring Circumſtances inducing a Probability, that not only ſuch Writing has exiſted, but alſo has been made ſome Uſe of, the Lords may very conſiſtently proceed to a Scrutiny for detecting the Forgery; becauſe though the ſimple fabricating a falſe Writing may be retracted, yet the leaſt making Uſe of it brings the Offender within the Statute. To prevent raſh Accuſations of Forgery, ſee the Remedy provided by *Act* 62. *Q. Mary*. The preſent Practice obliges the Purſuer to conſign only L. 40 to be forfeited to the Defender in caſe he ſuccumb.

8. In this Action of Improbation there are two Kinds of Proofs admitted; one called the direct Manner of Improbation, the other the indirect. The firſt is to be accompliſhed only by the Teſtimony of the Writer and Witneſſes inſerted in the Body of the Writing. Hence this Rule, that while the Writer and inſtrumentary Witneſſes are alive, the indirect Manner of Improbation is not competent, becauſe the direct is practicable; and in this Matter this other Rule is adopted, that deceaſed Witneſſes are held as Witneſſes for the Verity of the Deed, till the contrary appears upon a legal Proof. The indirect Manner of Improbation proceeds upon a Proof of certain Facts which do not immediately and directly infer Forgery, but which afford Premiſſes from which the Falſity of the Writing may by juſt and reaſonable Conſequences be inferred. Theſe are of ſo extenſive a Variety as to exceed the Bounds of the moſt particular Enumeration; but the chief Means of Proof after the indirect Manner are, a

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falſe Date, by the Proof of *alibi*, with reſpect either to Granter, Writer or Witneſſes, and a *comparatio literarum*.

9. The ordinary Puniſhment of this Species of *Falſhood* has by long Cuſtom been made capital; and though we have no Statute which expreſly ordains the Puniſhment to be the Pains of Death, yet we may well conſider the Statute of Q. *Mary*, and that Part of it which refers to the Civil Law, as a good Foundation for this Practice, when we find in the *l.* 22. *Cod. ad leg. Cornel. de falſis*, the Puniſhment of Death ordained to be inflicted for this Crime. Beſides, our Practice herein may be well juſtified by Arguments drawn from the Nature of the Crime, the Train of Miſchiefs likely to accompany it, and the Diſorder it threatens to the Society, by endangering the Lives of innocent Men, as well as by robbing them of their Goods and Eſtates; of which the late Caſe of Mrs. *Macleod* is a flagrant and irrefragable Proof. The Lords ſometimes, when they ſee Cauſe, remit the ordinary Puniſhment,

niſhment, and give Order themſelves for puniſhing the Offender.

10. But when they find the Offender to deſerve the ordinary Puniſhment, they remit him by their Decreet into the Juſtice Court to be puniſhed with the Pains of Law; where the Aſſize (being bound by an eſtabliſhed Rule in Law to conſider the Lords of Seſſion's Decreet as *probatio probata*) are tied down to find the Pannel guilty in reſpect of the Lords Decreet; which is truly finding the Pannel to be the Offender whom the Lords of Seſſion have tried and found guilty of the Crime, who are in this Caſe both Judges and Jury. Hence appears the Weakneſs of that common Scruple often ſtarted on theſe Occaſions, as if an Aſſize could not thus find a Forger guilty with a ſafe Conſcience, becauſe the Evidence has not been led in their Hearing; eſpecially when we attend to this, that their Verdict is a finding only that the Lords of Seſſion have ſo found, of which they have received the

the Evidence, namely, the Lords Decreet read in their Presence.

11. Another Species of *Falshood* is *Perjury*, which makes the Subject of a following Title, and the last consists in the *Use of false Weights and Measures*, of old severely punished by the Burrough Laws, *c.* 132. with the Pains of *High Treason*, unless remitted by the King. But *c.* 74. makes the Punishment to rise in Proportion to the aggravated Guilt of the Offender by a Reiteration of the Crime, and ordains only the fourth Offence to be punished with the Pains of Death. The Punishment of single Offences was by *c.* 52. made pecuniah. The *Act* 47. *Ja.* IV. ordained such Offenders to be punished as *Falsaries*: But now we are to be governed, as to the Punishment of this Species of *Falshood*, by *Act* 2. *Parl.* 19. *Ja.* VI. not only because it is the last Act touching this Matter, but because the Punishment thereof is certain and specifick, namely, Confiscation of Moveables: However, a third or fourth Offence may as justly be punished capitally,

rally, as a Theft of that Character may, upon the Authority of the foresaid Laws, and the Analogy of those Laws concerning Theft.

Stellionate.

FRAUD shews itself in the Affairs of Life under such variety of Shape, and is sometimes so much diversified from all other Appearances formerly known and distinguished, that the Law has been forced to make use of the general Term *Stellionate* to comprehend those Facts which tho' criminally fraudulent, yet whose essential Characters are different from these which have received a fixed and certain Name. Thus it is said in the Civil Law, wherever the Title of a Crime is wanting, we call it *Stellionate*, *l.* 3. § 1. *ff. stellionatus*. The chief criminal Facts which in the *Roman* Law have been distinguished with this Name, are the selling or impignorating the Goods of another Man, corrupting or changing Goods and Merchandise

diſe which had been ſold, ſelling the ſame numerical Thing to two different Perſons, and the like. Concerning the laſt, the Interpreters are very ill agreed; ſome think it *Falſhood* in a proper Senſe, others *Stellionate*, becauſe of the concealing and diſſembling the firſt Sale, without which the laſt could never be effected.

2. *Fraud* is of the Eſſence of this Crime; but ſome diſtinguiſh between a *Fraud in Commiſſion* and a *Fraud in Omiſſion*, and make the firſt only the Characteriſtick of this Crime. There may be indeed an innocent Omiſſion, which in no view is criminal; but between a fraudulent Omiſſion and a fraudulent Commiſſion, there ſeems to be no real Difference in this Matter.

3. It would ſeem that all the criminal Facts declared to be *Stellionate* in the *Roman* Law, are to be eſteemed ſuch in our Law, by the expreſs Authority of the 142 *Act*, 12 *Parl. James* VI. where the diſponing one Duty to two ſundry Perſons, is occaſionally prohibited: And the only Reaſon given

ven by the Legiſlature for the Prohibition is, becauſe ſuch criminal Fact is the Crime of *Stellionate* by the Civil Law, plainly implying that the *Roman* Laws againſt *Stellionate* were deemed ours, when we conſider that the Legiſlature thought it not needful to ſay any more for enforcing an occaſional Prohibition, in an Act treating of a different Subject-matter, than that it was ſuch a Crime by the *Roman* Law.

4. The granting Diſpoſitions of one and the ſame Subject to different Perſons, and Superiors receiving double Reſignations to the ſame Effect, and the granting double Aſſignations and Tacks, are prohibited by the 105 *Act*, *James* V. The Puniſhment of which is partly ſtated, partly arbitrary. The Offenders are declared *infamous*, and otherwiſe puniſhable in their Perſons and Goods, at the King's Will, according as the Facts ſhould appear to be more or leſs fraudulent. The Puniſhment of theſe probably would have been left to the Diſpoſition of the Common Law as

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Stellionate: But such Frauds as the Act sets forth had become frequent and common, and a particular Statute became necessary as a proper Check for a growing Offence. The Punishment of this Crime in the *Roman* Law was arbitrary; *Plebeian* Offenders were condemned to the *opus metalli*; Persons of any Rank to a temporary Banishment, *l.* 3. § 2. *ff. h. t.*

Perjury.

IN the ordinary Transactions of the Affairs of this Life, the indispensable Use of an Oath is obvious; for without it, the Judges and Ministers of the Law could not, on many Occasions, know the Truth of the Facts on which the Questions that claim their Decision do depend: It is therefore of the greatest Importance in every Society to preserve them in the highest Reverence, by punishing with reasonable Severity the manifest Violation of so sacred a Tie.

2. *Perjury* is defined a *Lie judicially affirmed upon Oath*; and considering how hainous a Crime this was esteemed among many of the Heathen Nations, it is very remarkable that the Emperor *Alexander*'s *Rescript* in the *l.* 2. *Cod. de rebus creditis & jurejurando*, should only leave the Punishment of it to the Divine Vengeance, in these Words, *Satis Deum ultorem habet.* See *Carpzov. Part.* 1. *Quæst.* 46. *n.* 4. In the whole Body of the *Roman* Law we find but a few scattered Fragments touching this Crime, and from these we gather the Punishment of it to have been *fustigatio*, or *beating with Rods*, *l.* 13. *§ ult. ff. de jurejurando*, and *l.* 13. *Cod. de testibus.* The Punishment of this Crime was the Censor's particular Care, as we learn from *Cicero*'s 3 *Book* of his *Offices*; but after the Extinction of that *Office*, it passed with Impunity. In after Times they began to punish it arbitrarily; and we see in the Time of the Emperor *Alexander*, it was lightly esteemed. But in later Ages it has been punished with more Severity, yet never

never exceeded an *arbitrary Punishment.* See *Carpz. Part.* 1. *Quæst.* 46. *n.* 43. *& seqq.*

3. *Dole* is an essential Ingredient in the Constitution of this Crime, as well as in that of others: For tho' in every Affirmation which violates Truth, there is a Lie, yet not such a Lie as constitutes this Crime; for Truth may be often violated without any bad Intention through Mistake and Error: He therefore who *swears falsly*, believing what he swears to be true, is not guilty of *Perjury*; and this *Belief* is often to be gathered with some measure of Certainty from the Circumstances of the Case, as from this, That by the Effect of the Oath, no Hurt or Damage could by any Possibility, in any Event, arise to any Person whatsoever; for it is not to be imagined a Man will designedly swear amiss without some Motive.

4. Weaker or stronger Terms of Affirmation, used in the Deposition of a Witness, are of no Avail in the Question, whether he is guilty of Perjury; because if the Subject-matter of the

Oath consists in *facto proprio*, or in Matters which have an inseparable Connection therewith, the saying only *he believes*, will not save him from the Pains of *Perjury*. For one who says *he believes*, or in the softest Terms affirms what he must needs know, is as much to be depended upon, as if he asserted what he deposes in the strongest Terms imaginable. And on the other hand, if the Subject-matter of the Oath may or may not consist with his Knowledge, the strongest Affirmation will not infer the Guilt of *Perjury*, if it appears that he truly believed what he swore, tho' it was false.

5. *Perjury* is either direct and formal, or consequential. The first consists in an immediate Violation of Truth, when a Person under the present Impression of an Oath administred by a Person having lawful Authority, affirms that to be true which at the Time of uttering the Affirmation he knows to be false. The last consists in the Breach of an Oath formerly made, when a Man acts not in Conformity with

with the Oath he had made, well termed *conſequential Perjury*, becauſe it is only to be inferred from Acts poſterior to the Oath which are thereto contradictory. *Perjury* of the firſt kind the Law puniſhes, the laſt *Deum ultorem habet.*

6. The concurring Teſtimony of two Witneſſes cannot be reprobated by the Teſtimony of a greater Number, becauſe the Law admits of the concurring Teſtimony of Two as full Proof; and no meaſure of Proof of the ſame kind is beyond that which is full, which was abſolutely needful to be confined to certain Limits, elſe we ſhould launch forth into an infinite Progreſs. Hence the Perjury of two concurring Witneſſes cannot be proved by Witneſſes; but the ſingle Teſtimony of one Witneſs may be reprobated by that of two, as in the Caſe of a Witneſs's ſwearing falſly, *circa initialia teſtimonii.*

7. The cleareſt and leaſt exceptionable Proof of *Perjury*, is that which appears on the face of an authentick

Writing granted by the Party, who in a Matter referred to his Oath has ſwore contrary to what it contains: In this Caſe, the Party ſuffering by the *Perjury* in a civil Matter, would have no Relief, but the *Perjurer* would be ſubject to the Pains of Law for his Perjury, as he would likewiſe be in thoſe criminal Matters which our Law permits to be deferred to the Offender's Oath, namely, thoſe which touch not *Life* nor *Limb*. If our Law indeed did allow of deferring capital Crimes to an Offender's Oath, it would be hard in that Caſe to puniſh the *Perjury*, according to the general Opinion of the Doctors, *quia licet redimere ſuum ſanguinem*: But it is to evite *Perjury* that our Law diſallows ſuch Means of Proof in capital Crimes, or even in thoſe which are puniſhable with corporal Pains. See *Macken. n. 5. h. t.*

8. The Puniſhment of *Perjury* is the *Forfeiture of ſingle Eſcheat, a Year's Impriſonment*, or longer, at the King's Will, and *Infamy*; which Puniſhment we place either upon the Foundation of

of an expreſs Statute, *viz.* 47 *Act* and 63 *Act*, *Ja.* III. referring to the 1 *Book*, 14 *chap. Reg. Maj.* or upon the foot of *Conſuetudinary Law*, recorded explicitely in the 19 *Act*, Q. *Mary*. See alſo the 80 *Act*, *Ja.* V. and 22 *Act*, Q. *Mary*.

Usury.

THE Crime of *Uſury* conſiſts in the taking a greater Intereſt on the Loan of Money than the Law permits; and it offends againſt that Part of the Order of Society which enjoins a reaſonable Equality to be obſerved in the various Intercourſes of Commerce, and juſtly therefore calls for due Correction: For as there is nothing which is capable of being made the Inſtrument of greater Miſchief than great Riches are, ſo it was in a particular manner neceſſary for the good Order and Government of Society, to provide ſuitably againſt thoſe Abuſes which were likely to attend Opulence in the Hands of avaricious and covetous Men. The lower Rank of Men often want the

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Use of that wherewith the rich are plentifully provided: And if the Law did not interpose its Aid to retrench the exorbitant Profits of Loans, the first would be too often exposed a Prey to the last; for Necessity will submit to the hardest Conditions, if they promise Relief.

2. It is a Question disputed with great Animosity among Divines, as well as Lawyers, if the taking any Interest at all on the Loan of Money is lawful. The Law of *Moses* indeed prohibited the *Hebrews* to take any Interest on the Loan of Money from those of their own Nation, *Exod.* xxii. 25. *Levit.* xxv. 27. *Deut.* xxiii. 19. and the Observation of this Law was so rigid, that the common Offices of Civility could hardly be practised between a Debtor and his Creditor, without falling under some Suspicion of offending against it. See *Selden de jure naturæ & gentium secundum Hebræos, lib.* 6. *cap.* 9. But we cannot imagine this Law had any other than a political Foundation; for had there been any inherent Turpitude

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in the Thing, the Prohibition must have been extended to the taking Intereſt from Strangers as well as others. The common Objection to the Lawfulneſs of lending on Intereſt is, That Money is a Thing in its own Nature barren and unfruitful; but though it is ſuch in a phyſical Senſe, yet the Induſtry of Man can render it fruitful, and we effectually feel its Fecundity in the Things which may be purchaſed with it: Nor is that ſolely owing to the Induſtry of the Uſer; for as Money without Induſtry will bring no Profit, ſo neither will Induſtry without Money: It is in Effect a letting out of one's Money, and there is no eſſential Difference between this kind of Location and that of a Houſe, or any other Subject which of itſelf is not naturally productive of Fruits. Thus the Crime of *Uſury* is not the taking Intereſt on the Loan of Money, but taking a higher Intereſt than the Law permits.

3. In different Views the *quantum* of Intereſt may be juſtly made higher in ſome Caſes than in others, but in Pra-

Practice one general Rule is necessary to govern it in all Cases; for to accommodate this *quantum* to an exact Justness in all the variety of Cases that occur, would require a Multiplicity of Rules, whereof the Application would be impracticable. *Interest* varied with the *Romans* according to the Increase and Decrease of their Riches; the highest were the *usuræ centesimæ*, which was One *per Cent. per* Month, or Twelve *per Cent.* in the Year: And thus also, owing to the same Causes, it has varied with us, and gradually diminished from Ten to Five *per Cent.* in the Year. The Doctors distinguish two kinds of Usury, the *usura manifesta*, and *velata*, *direct* and *indirect Usury*. The first takes place in the Contract of *mutuum*, the last in the other Contracts. Examples of both we find in our own Statutes.

4. We learn from the Laws of *Reg. Majest.* that *Usury* in ancient Times became only criminal by *Continuation*: One single *usurious Act*, or even several, did not amount to an Offence which

which the Law took hold of; it admitted of *Repentance* as a sufficient Atonement to wipe out the Crime. Thus a Man could not be punished for *Usury* in his own Life, because while he lived he might repent, and during the possibility of his Repentance he could not be tried for the Crime; but if he repented not, his Heir might be forfeited after his Death. *Reg. Maj. Book 2. chap. 54.* The Severity of this Law towards *Heirs*, contrary to the common Principle, That Punishments should affect only the Offenders themselves, disappears, when we consider how the Estates, to the Succession of which they are called, were made out of the Wreck of many indigent Persons, of whose necessitous Condition the Predecessor had taken the cruel Advantage of raising to himself a Fortune on their Ruins, and the Heir can hardly be said to suffer by the *Privation* of such ill got Wealth. By *Repentance* in this Law, we take *Restitution* to be meant, for thereby only can we imagine the Usurers could justify such a thorough

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Repentance, as the Law would accept of, for an Expiation of the Crime; and in that the Wisdom of the Statute appears as well as in this, That nothing was more likely to be an Inducement to make *Restitution*, where they had more grievously offended, than the Apprehensions of a *future Forfeiture* of the whole Inheritance, which Men of that Character seem so fond of transmitting to their Posterity.

5. We distinguish in our Statutes three different Species's of *Usury*. The *First* consists in taking more than Ten Pounds *Scots*, or Five Bolls of Victual, for the Forbearance of Payment of One hundred Pounds for a Year, 52 *Act*, 11 *Parl. Ja.* VI. Now by a Statute of Q. *Anne*, *Anno* 1714, this Species of *Usury* is committed by taking more than Five *per Cent.* for the like Forbearance of Payment. The bare Stipulation of a higher Interest than the Law permits, subjects one to the *Pains of Usury*, tho' never exacted, if it is not owing to Mistake, or manifestly appears, *quod aberat animus fœnerandi.*

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6. The *Second* consists in taking the legal Interest before the Term of Payment: And thus *Usury* is not only committed by exacting and demanding it sooner than the Term of Payment, but in simply receiving it sooner when offered, else the Law might be easily eluded. The Words of the Statute are, *shall neither retain, exact, crave, or receive*, 28 *Act*, 23 *Parl. Ja.* VI.

7. The *Third* is distinguished by the concealed manner of committing it under the specious Cover of another Contract than *mutuum*, as when the Back-tack-duty in an improper Wadset is made to exceed the legal Interest of the Sum in Consideration of which the Wadset was granted, 251 *Act*, 15 *Parl. Ja.* VI. and under a Clause of this Statute all *usurious Contracts* are comprehended, how much soever they are artfully disguised and coloured with a different Face and Appearance. This the Doctors call *usura velata*, because a Veil is drawn over the Crime to hide it from the Law.

8. There is a *Fourth* Species of *Usury*, which consists in the taking *Præmiums*, or, as our Law speaks, taking *Buds* or *Bribes* for the Loan of Money: But as this is *actus animi*, it is of the most difficult Proof, and can only be gathered with any measure of Certainty from these two Facts, a preceeding Treaty concerning a *Præmium*, or that the Creditor receiving the Gift is a *confessed Usurer*, and has been thereof formerly convicted. A Gift in the first Case is explained a *Præmium* by the antecedent Treaty, and in the last by the *Character* of the Receiver.

9. For the Proof of this Crime, the Defender is bound to produce the *usurious Writing*, notwithstanding the common Maxim, *nemo tenetur edere instrumenta contra se*, which in our Practice is not regarded, especially in criminal Matters, as in the Action of Improbation. Pactions which have an inseparable Relation to the *usurious Contract*, and which may be therefore called *intrinsick*, can only be proved by the instrumentary Witnesses of the *Contract*,

7 *Act*,

7 *Act*, 16 *Parl. Ja.* VI. But Pactions extrinsick to it may be proved by other Witnesses. This Crime may be likewise proved by the Oath of the Party, Receiver of the unlawful Profit, contrary to the common Principles of Law, because of the Darkness into which these Dealings are studiously involved, which often nothing less than the Oath of the Usurer can bring to Light. See the said *Act*.

10. The Punishment of this Crime was *Confiscation* of the *Moveables* of the Offender, nullifying the *usurious Contract*, and *Forfeiture* to the Crown of the Sums therein contained; and if the Party lesed concurred in the Prosecution, he was entitled to *Repetition* of the unlawful Profit; otherwise not, 251 *Act*, 15 *Parl. Ja.* VI. Now by the *Act*, 12 *Annæ*, the *usurious Bond* or *Contract* is made utterly void, and the Offender forfeits the treble Value of the Monies and other Things contained in such Bond or Contract, whereof one half belongs to the Crown, and the other to the Persons who will sue for the

ſame, in the ſame County where the Offence is committed, but not elſewhere.

11. The Laws againſt *Uſury*, and thoſe againſt *Forſtalling*, are owing to Cauſes of the like Nature; both tend to reſtrain the exorbitant Profits which may be made at the Expence and to the Hurt of others: In the firſt by the *Loan of Money*, and in the laſt by the *Sale of Merchandiſe*. A *Forſtaller* properly is he who buys up Goods deſigned for Sale in publick Market, before they are there expoſed, with an Intention to ſell them at a dearer Rate; and a *Regrater* is he who buys up Goods in general for the like End. But by Cuſtom theſe Words are promiſcuouſly uſed to ſignify either the one or t'other. The firſt Species of *Forſtalling*, and which is properly ſuch, is puniſhed by the 21 *Act*, *Ja.* V. with Impriſonment and Eſcheat of the *forſtalled Goods*. The eſſential Characters of this Offence are, 1. The Buyer's Knowledge of the Goods being deſigned for Sale in open Market. 2. Buying

Buying them before they are so exposed to Sale. 3. An Intention to sell them again at an advanced Price, which is presumed from an after Sale, or such like other palpable Marks. The second Species of this Offence consists either in dissuading Sellers from coming to Markets, or when they are come thither, advising them to raise the Price of their Commodities. The third consists in the buying Things in a Market with an Intention to sell them again in the same Market, or in any other Market held in a Place within four Miles. These two Species's of the Offence, as well as the first, are punishable, according to the 150 *Act*, 12 *Parl. Ja.* VI. by a Fine of *Forty Pounds* for the first Offence, a *Hundred Merks* for the second, and *Escheat of Moveables* for the third. And the Indictments for this Offence containing the general Alledgeance of *forstalling* and *regrating*, without setting forth the special Matter, are by this Statute declared to be *relevant*.

Injuries.

THE Law extends its Care and Protection to our *Reputation* and *good Name*, as well as to our Persons and Estates, by the Sanctions of those Laws which chastise the contumelious and malicious Reproaches, which either the Envy or the Pride of wicked Men is apt to throw out against their Neighbours. The repressing *Injuries* of this kind is so much the rather the Object of the publick Care, by how much it is fit to leave no Misdemeanor, how small soever, to the Correction of private Resentment, that no Person may in any Case be under a Temptation to be himself the Avenger of the Injuries he meets with, nor arrogate that to himself which alone belongs to publick Justice to inflict in a State of civil Society, which however private Persons would be apt to do, if the lesser Injuries offered to them were accounted beneath the Observation of the Law. Thus nothing seems to be more

more the Intereſt of every State than to afford a prompt and ready Redreſs of all Grievances of this Character, which may induce the Subjects to think it as diſhonourable to avenge the ſmaller Injuries by the Force of their own Arm, as they would, to put in Execution the Sentences which the Law pronounces for the more atrocious Crimes, tho' committed againſt their deareſt Friends.

2. Every unjuſt Action which treſpaſſes upon the Right of another Man, done deſignedly, may well be called *an Injury*: But *Injury*, as it is taken in this Title, is no other than Contumely or Reproach caſt upon us, contrary to good Manners; or ſome perſonal Harm inflicted, which the Doctors diſtinguiſh into that which is *verbal*, and that which is *real*.

3. *Verbal Injuries* conſiſt in the uttering reproachful Names which wound the Character and Reputation of him to whom they are imputed. If even any thing was objected to one in a contumelious manner, which according to the

the Customs of the Place was a Reproach, it was deemed a *verbal Injury*, which fell under the Observation of the Law, *l.* 15. *ff. h. t.* The two Characteristicks by which we may discern *verbal Injuries*, are these; 1. That the injurious Word or Expression be such as imputes a thing which either in its own Nature, or in the current Opinion and Estimation of the Place, is truly a Reproach. And 2. That it has a manifest and visible Tendency to *Defamation*, and to lessen one's Character and Reputation in the World, either in itself, or by the publick Way and Manner of uttering it. Words may contain a Reproach, but such as is beneath the Observation of the Law, if the Words have no Tendency to Defamation. One essential Character of an *Injury* is to be found only in the Intention of the Offender, namely the *animus injuriandi*; for without Dole there is no Offence, *l.* 3. *ff. h. t.* and from the Concurrence of the two first Characters of the Words and Expression, this one is chiefly to be gathered:

ed: But becauſe that cannot always be done with Certainty, the Offender's purgatory Oath in Supplement may in certain Caſes reaſonably be admitted for Exculpation. See *Carpz. Part.* 2. *Quæſt.* 97. *n.* 5 and 8. *Maſcard. Vol.* 1. *Concluſ.* 97. and *Menoch. de præſumptionibus, lib.* 5. *Præſumpt.* 40. *n.* 17.

4. From this eſſential Quality of an *Injury* on the Part of the Offender, the *animus injuriandi*, we muſt excuſe him who ſtruck or reproved by Word of Mouth, when he meant to correct and chaſtiſe, providing he was a Perſon thereto entitled; or him who familiarly ſpoke a hard thing in ludicrous manner; and thoſe who object even a Crime to a Witneſs to invalidate his Teſtimony in the Courſe of judicial Proceedings, offering at the ſame time to make it good.

5. If out of Judgment a Crime is objected *animo injuriandi*, the Truth of the Reproach, according to *Paulus*, *l.* 18. *ff. h. t.* makes it no Injury, becauſe (*ſays he*) it is behooful and expedient that the Crimes of Offenders be brought

brought to Light. See *Matth. n. 7. h. t.* Many of the Doctors differ, particularly *Covarruvias, lib. 1. variar. Resolut. c. 11. n. 6.* whose Opinion we incline to espouse, because where a Crime is imputed *animo injuriandi*, the Intention of the Agent is bad, and any Good which may eventually flow from it to the Publick by the Discovery, ought to be of no Benefit to him, as being owing to Chance and a Conjuncture of Circumstances which he had not in his Eye, who singly pointed at the Gratification of his own Revenge. See *l. 3. Cod. de offic. Rect. provinciæ, l. 1. Cod. de famos. libell. Carpz. Part. 2. Quæst. 96. n. 73.* Except the Case mentioned, *n. 42, &c.* of those who proclaim Favours they ought to conceal, tho' without the *animus injuriandi.*

6. Amongst *verbal Injuries*, that of publishing defamatory Libels or Pasquils was by the *Romans*, and is by us esteemed the highest, as being the most permanent. A *Pasquil* is a Composition of Facts reduced into Writing, which the Author does not mean to prove,

prove; but in order to defame his Fellow Subject, affixes or drops it in ſome publick Place, under a fictitious Name, or without any Name at all. It differs from a written Injury in theſe Reſpects, 1. It imputes ſome Crime or great Offence which is more than Contumely or Reproach. 2. It is not owned by its Author. And 3. Is induſtriouſly made publick. The Puniſhment of this Injury ſeems to have been capital according to the *Roman* Law, by the Conſtitution of *Valentinian de famoſis libellis*. *Carpzov. P.* 2. *Quæſt.* 98. *n.* 8. thinks the *pœna talionis* the proper Puniſhment. In our Practice the Puniſhment is arbitrary, as *Mackenzie* teaches, except in two Caſes, as he ſays, where it is capital. 1. When a Paſquil is publiſhed againſt the King. 2. Where a capital Crime is thus charged upon an innocent Man. As to the firſt, it would now be found to come within the *Act* 4. *Parl.* 1. Q. *Anne*, and be ſubject only to an arbitrary Puniſhment. The laſt is too ſevere, and ſeems to be without Foundation, at leaſt,

leaſt, is not very conſiſtent with the Spirit of the ſaid Law.

7. Not unlike to an Injury of this Kind, is that which our Law diſtinguiſhes by the Name of *Leeſing making*, which at firſt conſiſted in raiſing Diſcord between the King and People, and was puniſhed capitally by *Act* 43. *Ja.* I. extended to the calumniating of the King to the Subject, and of the Subject to the King, by *Act* 83. *Ja.* V. further extended to certain Facts, by *Act* 134. *Parl.* 8. and *Act* 209. *Parl.* 14. *Ja.* VI. But for good Reaſons, the Puniſhment of this Crime was reſtrained to an arbitrary one, by Fining, Impriſonment, Baniſhment or corporal Pains, Life and Limb being always preſerved, *Act* 4. *Parl.* 1. Q. *Anne.*

8. Real Injuries are committed by certain Actions which inflict perſonal Hurt, or which offer an Indignity or Inſult; but becauſe many of theſe are beneath the Notice of the Law, we diſtinguiſh theſe which are not atrocious from thoſe which are, *l.* 7. § 6 and 7. *ff. h. t.* for an Injury may become atro-

atrocious three ſeveral Ways. 1. By the very Nature of the injurious Fact, as if a Blow or Wound is given. 2. By reaſon of the Perſon who is offended, as if an Indignity is offered to a Magiſtrate, to a Parent, or to a Maſter. 3. By the Circumſtance of Time and Place, as when it is committed in a publick Place, in Preſence of a Magiſtrate, or in Time of Divine Service. Of theſe three Foundations of Atrocity, the firſt is the moſt ſolid; and with reſpect to Wounds given, the Atrocity of the Injury is heightned, either by the greatneſs of the Wound, or the Place of the Body where it is inflicted, which in our Practice is not only puniſhed arbitrarily, according to the Atrocity of the Injury, *ad vindictam publicam*, but produces a private Action for Aſſythment and Reparation of Damage, as far as any Loſs of that Sort can receive an Eſtimation: In which, due Regard will be had to the State and Condition of the injured Perſon, the Nature of the Wound, the Influence it may have on the after Part of his

Life, in the Exercise of his particular Vocation, and the like; but especially, to the Wealth or Poverty of the Offender.

9. Of all real Injuries, that which we call *Hamesucken* is punished with the greatest Severity, being committed by the violent assaulting a Man in his own House: The Atrocity whereof arises from the Place of Commission, by invading one where he ought to find himself in the greatest Safety, his own House being his Sanctuary. The *Romans* carried this Notion of a Man's House being his Sanctuary, to the outmost Point. See *l.* 18. & 21. *ff. de in jus vocando*, & *l.* 23. *ff. de injuriis.*

10. *Hamesucken*, as defined in our Law, is an Assault committed upon a Man in the House where he ordinarily resides, and where he is considered as at Home. In the Description of this Crime, which we find in *B.* 4. *c.* 9. *Reg. Maj.* we observe two essential Characters of the House, signified by the Epithets *proper* and *certain*. By the first is understood a House which one possesses

poſſeſſes as his ordinary Place of Reſidence, whether he is Proprietar of it or no, but not that wherein he happens to be occaſionally, as in the Caſe of *Gordon* of *Avarby*, 15. *November* 1686, which is well explained by the Words of the Law, where he dwells, lyes and riſes nightly and daily. By the Epithet *certain*, we underſtand a Houſe that one holds by ſome juſt Title of Poſſeſſion for ſome reaſonable Time, which makes it to be conſidered as his Place of Reſidence in a proper Senſe, which it would not be if he had a precarious Poſſeſſion of the Houſe occaſionally for the Entertainment of a few Days. And under the Word *Houſe*, are comprehended all the Office-houſes belonging to it, and Gardens adjoining, within one and the ſame Wall. The Protection of this Law, following either the Spirit or Letter of it, is to be extended to the Wife and Children, as well as the Maſter of the Houſe, and much may be ſaid for comprehending even Servants.

11. If an Aſſault is committed upon a Man immediately after calling him out of his Houſe, and without any Cauſe of Provocation then given by him, it is within this Law, becauſe the calling him out of his Houſe in ſuch Caſe, is only to elude it; but the aſſaulting a Man in his Shop diſcontiguous from his Houſe, or in his Ship, does not ſeem to be within the Deſcription of this Law, though within the Reaſon of it, and we apprehend would not be conſtrued *Hamefucken*, becauſe the Judgments of the Court ſeem to lean towards the mitigating the Severity of this rigid Law. An Inn-keeper ſurely is as much, if not more, entitled to the Benefit of this Law, than any Landlord whatſoever, at the Hands of his Lodgers, as well as of any others; for the Inn is the proper and certain Houſe of the Inn-keeper, not of the Paſſenger who comes occaſionally.

12. It is an eſſential Character of this Crime, that there be an Aſſault made upon the Maſter of the Houſe; by which is meant not only an actual Beating,

ing, but a Blow aimed, though averted; yet Blows threatned, or other Indignities offered, would not amount to an Aſſault, though our Practice carried it a little further in the Caſe of the Lady *Traquair*; where the offering to ſtrike her with a drawn Sword, was deemed an Aſſault. It is generally held, that the Aſſault which conſtitutes *Hamefucken*, muſt not only be committed in one's Houſe, but in conſequence alſo of an Intention conceived before entring into the Houſe: For if the Aſſault falls out occaſionally, when one happens to be in the Houſe upon Invitation or otherwiſe, it is not *Hamefucken* in a proper Senſe. This Rule is founded upon the original Import of the Word *Sucken*, which ſignifies to purſue or ſeek after; but it ſeems to lean upon a very ſlender Foundation, when we conſider that the chief Character which conſtitutes the Atrocity of this Injury; namely, *the aſſaulting a Man in his Sanctuary*, is as much to be found in the Caſe of an occaſional Aſſault while one happens to be in the

House, as when one goes to the House with an Intention to invade its Master; and with this additional Aggravation too, that the Laws of Hospitality are remarkably thereby transgressed.

13. The Punishment of this Crime is capital according to our Practice, which has for its Foundation an Inference drawn from this antient Law of the *Majesty*, wherein it is ordained to be prosecuted after the same Manner as ravishing of Women; but the short Prescription therein limited is now obsolete, yet a remarkable Delay of the Prosecution, may well be construed to extend to the Extinction of this Injury, as well as of others, *dissimulatione*. In the Proof of *Hamesucken*, domestick Servants, Friends and near Relations are admitted as habile Witnesses, tho' in other Cases exceptionable, which is owing to the Necessity of the Thing.

14. Verbal Injuries may be retorted lawfully under these Limitations. 1. If the Retortion preserves the Character of being in Defence, by consisting in Expressions which import only a Con-

Contradiction or Denial, though uttered after a Manner that is injurious; but plainly to recriminate is no defensive Retortion, and therefore not permitted. 2. The Retortion must be *ex incontinenti*, immediately upon receiving the Injury if done in private, or when the same comes to Knowledge; for then only can one be said to receive such an Injury when it is made known to him; but if done *ex intervallo*, it degenerates into Revenge, *Carp. P. 2. Quæst. 97. n. 24.* Hence verbal Injuries compensate each other, when the retorted Injury is kept within just Bounds, or when it does not appear who was the first Provoker. *l. 39. ff. soluto matrimonio*: But real Injuries, which consist in Violence and Hurt done, do not compensate each other, because they are a Breach of the Peace, and the *vindicta publica* must be satisfied.

15. It is particular to this Crime, that, according to the *Roman* Law, we might be injured not only in our own Person, but in that of our Wife, our Chil-

Children or Servants; which, in so far as concerns a Wife or Children, might well be adopted into our Law, because the *Romans* placed the Foundations of this Doctrine in the Power and Affection we have with respect to the injured Persons, *l.* 1. § 3. *ff. h. t.* which do both here concur, according to the Construction of our Law, when they are applied to the Case of Husband and Wife, or Children. Injuries were likewise understood to be done to the Living through the Persons of the Dead, whose Representatives they were, as by disturbing their Ashes, *l.* 8. *ff. de religiosis & sumptibus funerum*; which it is thought would hold in our Law.

16. Injuries are cancelled and extinguished by the Remission and Pardon of the injured Party, whether express or tacite, or by Paction and Transaction. This will hold in our Law as to verbal Injuries, but not in real ones, wherein there is a Breach of the Peace; for *ad vindictam publicam* Magistrates may and ought to punish *ex officio*. The tacite Remission of an Injury is to be gathered

gathered from certain Facts which imply and infer it, as mutual interchanging of ordinary Civilities between the offending and offended Parties. Thus also Injuries are cancelled *dissimulatione*, by dissembling the Injury, and behaving as if we had received none; and one is understood to have dissembled in these Cases, when he does not immediately resent the Injury upon receiving it. See *Matth.* n. 14. *h.* t. and *Carp.* P. 2. *Quæst.* 97. n. 49, &c.

17. The Punishment of Injuries by the Law of the 12 Tables, was Retaliation in the Case of Demembration; but for Blows there was a pecuniary Mulct of 25 *Asses*: Both went into Desuetude; the first as inept, because in the Variety of Cases it was impossible to make the Punishment in any Sort commensurate to the Crime. And what is said in the sacred Writings, of *an Eye for an Eye, and Tooth for a Tooth*, is only a Proverbial Way of Speaking, meaning no other, than that Punishments in general should be suited to the Crimes for which they are

to

to be inflicted. See *Puffendorf*, B. 8. c. 3. § 27. The laſt, as in no wiſe adequate to the Offence, for 25 *Aſſes*, which in the Infancy of their Republick might be accounted a round Sum, became afterwards with the immenſe Growth of their Riches, to be a very inconſiderable one, being 19 *Pence*, 3 8ths *Sterling*.

18. With us, Actions upon verbal Injuries are competent only to the Commiſſars Court, the proper one for Scandal and verbal Reproaches tending to Defamation; of whoſe Juriſdiction in this Point the Court of Juſticiary is ſo tender, as not to ſuſtain any Proſecutions of verbal Injuries before themſelves, unleſs done to Magiſtrates, or other Perſons veſted with publick Authority; whoſe Honour they are more particularly called upon to vindicate, as being the ſupreme Judges of Crimes and Offences of all Kinds. Infamous Libels, though a Sort of verbal Injury, yet as being of the more atrocious Kind, are competent to the Juſtices, and to inferior Judges having

Criminal

criminal Jurisdiction. The Punishment of verbal Injuries is commonly a pecuniary Mulct and Recantation; or if the Offender is poor, doing some Pennance. That of real Injuries is arbitrary, and is governed by the Circumstances of the Case, according as they do either plead Mitigation or Severity.

FINIS.

ERRATA.

Page 55. *Line* 3. *read* so found. *P.* 117. *L.* 18. *r. Mosaick* Law.